IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STRICKLAND TOWER MAINTENANCE, INC.,

Plaintiff,

v.

AT&T COMMUNICATIONS, INC.,

Defendant and Counterclaimant,

v.

STRICKLAND TOWER MAINTENANCE, INC.,

Counterclaim Defendant.

Case No. 94-C-1015-H

ORDER

This matter comes before the Court on a motion to alter or amend judgment to provide for pre-judgment interest by Plaintiff Strickland Tower Maintenance, Inc. ("Strickland") (Docket # 143) and on a motion to tax attorneys' fees as costs by Strickland (Docket # 144).

From February 26, 1996 through March 8, 1996, a jury trial was held in this matter. The jury rendered a verdict in favor of Plaintiff on the issue of economic duress in the amount of $470,601.00 and on the issue of breach of contract in the amount of $172,793.00. On March 13, 1996, in accordance with the special interrogatory form jury verdict, the Court entered judgment in favor of Plaintiff for $643,394.00.

Plaintiff argues first that, pursuant to an Oklahoma statute providing that "[a]ny person who is entitled to recover damages certain, or capable of being made certain by calculation . . . is entitled also to recover [pre-judgment] interest," Okla. Stat. tit. 23, § 6 (1987), the judgment in the instant case should be amended to allow pre-judgment interest. The Court disagrees. Here, the damages awarded by the jury were neither liquidated nor "capable of ascertainment by calculation or resort to well-established market values." Transpower Constructors v. Grand River

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Dam Authority, 905 F.2d 1413, 1422 (10th Cir. 1990). Therefore, the damages do not fall within the purview of the statute relied upon by Plaintiff, and Plaintiff's motion must fail.[1]

Plaintiff's second motion requests an award of attorneys' fees pursuant to Okla. Stat. tit. 12, § 936 (1988). The statute provides that "[i]n any civil action to recover on a[] . . . contract . . . for labor or services, unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs." The underlying nature of the lawsuit determines whether the statute applies in a given case. Holbert v. Echeverria, 744 P.2d 960, 966 (Okl. 1987). The Oklahoma Supreme Court has narrowly construed this statute, which provides an exception to the general rule in the United States that each party shall bear its own attorneys' fees, to apply only where the damages arise directly from the provision of labor and services pursuant to a contract, rather than where damages are merely collateral to the rendition of labor and services. See id.

In the instant case, the Court finds that Plaintiff's claim for breach of contract was a "civil action to recover on a contract for labor or services". Thus, Plaintiff is entitled to reasonable attorneys' fees in connection with that claim. However, the Court finds that the damages awarded by the jury on the issue of economic duress are not in the nature of a recovery for AT&T's failure to pay for labor and services. Thus, Plaintiff is not entitled to attorneys' fees with respect to the economic duress issue.

The Court must therefore determine the amount of reasonable attorneys' fees that Plaintiff is entitled to recover on its breach of contract claim. See Arkoma Gas Co. v. Otis Eng'g Corp., 849 P.2d 392, 393 (1993). Plaintiff asserts that its attorneys expended a total of 2,118.6 attorney hours on the lawsuit. Of the total hours expended, Plaintiff requests reimbursement for 1,301.5 hours at an hourly rate of $190.00, for 779.0 hours at an hourly rate of $135.00, and for 38.1

[1] To the extent that Plaintiff argues in its motion that it is entitled to ordinary post-judgment interest accruing at the applicable federal rate, see Motion to Alter or Amend Judgment to Provide for Pre-Judgment Interest at 4-5, the Court agrees. However, it is unnecessary to alter or amend the March 13, 1996 judgment to provide for routine post-judgment interest.

hours at an hourly rate of $95.00. As a result of the "hours times rate" calculation, Plaintiff requests an award of $356,069.50 for attorneys' fees.[2]

This amount is the starting point for the Court's determination of a reasonable award. Initially, because Plaintiff may only receive attorneys' fees for the breach of contract claim, the Court will take into account the percentage of the total jury award that relates to that claim in its determination. See, e.g., Arkoma Gas Co., 948 P.2d at 394. Of the total jury verdict for $643,394.00, the special interrogatory form verdict reflects that $172,793.00 was attributable to the breach of contract claim. Thus, slightly more than one quarter of the entire jury verdict is attributable to the breach of contract claim.

Among the other factors which the Court considers in determining a reasonable attorney fee under the instant statute are the time and labor required to perform the services, the novelty and difficulty of the legal questions, and the skill required to perform the legal services properly. Arkoma Gas Co., 849 P.2d at 394 n.2. While the Court believes that the hourly rates charged by Plaintiff's attorneys are reasonable under the circumstances, after a consideration of the above-enumerated factors, the Court finds the total hours expended by Plaintiff's counsel on the high side for a lawsuit with no novel or difficult legal questions. Further, much of the time was expended on disputes that were unnecessary. Therefore, on the basis of the factors recited above, the Court awards Plaintiff attorneys' fees in the amount of $118,690.00.

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[2] Plaintiff has also requested attorneys' fees for 12.4 hours of legal assistant time billed at an hourly rate of $50.00. However, legal assistant fees are not covered by the Oklahoma statute at issue. R.J.B. Gas Pipeline Co. v. Colorado Interstate Gas Co., 813 P.2d 14, 26 (Okl. Ct. App. 1990).

In conclusion, Plaintiff's motion for pre-judgment interest (Docket # 143) is denied. Plaintiff's motion for attorneys' fees (Docket # 144) is granted to the extent that the Court awards Plaintiff $118,690.00.

IT IS SO ORDERED.

This 30th day of May, 1996.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. SUSAN ANN HURST aka Susan A. Hurst fka Susan Ann Mader; TOMMY LEE HURST aka Tom Hurst aka Tommy Hurst; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; BENEFICIAL OKLAHOMA, INC; CITY OF COLLINSVILLE, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	Civil Case No. 95-C 741B

FILED
MAY 30 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAY 31 1996

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 30 day of May, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, CITY OF COLLINSVILLE, OKLAHOMA, appears not having previously filed a Disclaimer; and the Defendants, SUSAN ANN HURST aka Susan A. Hurst fka Susan Ann Mader, TOMMY LEE HURST aka Tom Hurst aka Tommy Hurst, and BENEFICIAL OKLAHOMA, INC., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, TOMMY LEE HURST aka Tom Hurst aka Tommy Hurst, was served a copy of Summons and Complaint on September 19, 1995, by Certified Mail; that the Defendant, BENEFICIAL OKLAHOMA, INC, was served a copy of Summons and Complaint on August 7, 1995, by Certified Mail; that the Defendant, CITY OF COLLINSVILLE, OKLAHOMA, was served a copy of Summons and Complaint on August 7, 1995, by Certified Mail.

The Court further finds that the Defendant, SUSAN ANN HURST aka Susan A. Hurst fka Susan Ann Mader, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning November 3, 1995, and continuing through December 8, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, SUSAN ANN HURST aka Susan A. Hurst fka Susan Ann Mader, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, SUSAN ANN HURST aka Susan A. Hurst fka Susan Ann Mader. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the

Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on September 5, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on August 31, 1995; that the Defendant, CITY OF COLLINSVILLE, OKLAHOMA, filed its Disclaimer on August 24, 1995; and that the Defendants, SUSAN ANN HURST aka Susan A. Hurst fka Susan Ann Mader, TOMMY LEE HURST aka Tom Hurst aka Tommy Hurst and BENEFICIAL OKLAHOMA, INC., have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on September 13, 1995, Tommy L. Hurst filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 95-02829-C. On January 8, 1996, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on February 22, 1996.

The Court further finds that the Defendant, SUSAN ANN HURST, is one and the same person as Susan A. Hurst, and formerly known as Susan Ann Mader, and will

hereinafter be referred to as "SUSAN ANN HURST." The Defendant, TOMMY LEE HURST, is one and the same person as Tom Hurst and Tommy Hurst, and will hereinafter be referred to as "TOMMY LEE HURST." The Defendants, SUSAN ANN HURST and TOMMY LEE HURST, filed a Petition for Divorce on November 16, 1992, in Tulsa County, Oklahoma, Case No. FD-92-7488, as of March 20, 1995 a Divorce Decree has not been filed of record.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Nineteen (19), Block Five (5), PRAIRIE VIEW ADDITION, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof,

The Court further finds that on March 30, 1988, the Defendant, SUSAN ANN MADER, executed and delivered to CROSS ROADS FINANCIAL SERVICES, INC., her mortgage note in the amount of $52,678.00, payable in monthly installments, with interest thereon at the rate of Nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, SUSAN ANN MADER, a single person, executed and delivered to CROSS ROADS FINANCIAL SERVICES, INC., a mortgage dated March 30, 1988, covering the above-described property. Said mortgage was recorded on April 8, 1988, in Book 5092, Page 1388, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 18, 1988, CROSS ROADS FINANCIAL SERVICES, INC., assigned the above-described mortgage note and mortgage to THE

FLORIDA GROUP, INC. This Assignment of Mortgage was recorded on July 20, 1988, in Book 5115, Page 2038, in the records of Tulsa County, Oklahoma. A Corrected Assignment of Mortgage was recorded on July 26, 1988, in Book 5117, Page 569, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 9, 1988, THE FLORIDA GROUP, INC., assigned the above-described mortgage note and mortgage to TRUST AMERICA RESOURCES, INC. This Assignment of Mortgage was recorded on September 16, 1988, in Book 5128, Page 1727, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 9, 1988, TRUST AMERICA RESOURCES, INC., assigned the above-described mortgage note and mortgage to Government National Mortgage Association. This Assignment of Mortgage was recorded on April 21, 1992, in Book 5398, Page 1768, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 2, 1992, GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on April 21, 1992, in Book 5398, Page 1769, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 19, 1992, the Defendant, SUSAN ANN HURST, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on September 14, 1992.

The Court further finds that the Defendant, SUSAN ANN HURST, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, SUSAN ANN HURST, is indebted to the Plaintiff in the principal sum of $71,317.10, plus interest at the rate of 9 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $30.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of $684.14 which became a lien on the property as of May 13, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, SUSAN ANN HURST, TOMMY LEE HURST and BENEFICIAL OKLAHOMA, INC., are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, CITY OF COLLINSVILLE, OKLAHOMA, disclaims any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, SUSAN ANN HURST, in the principal sum of $71,317.10, plus interest at the rate of 9 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $30.00, plus any accruing costs and interest, for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of $684.14, plus accrued and accruing interest, for state income taxes, plus costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, SUSAN HURST, TOMMY LEE HURST, BENEFICIAL OKLAHOMA, INC.,

CITY OF COLLINSVILLE, OKLAHOMA and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, SUSAN ANN HURST, to satisfy the judgment in Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $684.14, plus accrued and accruing interest, for state income taxes.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $30.00, plus

accruing costs and interest, personal property taxes which

are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

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DICK A. BLAKELEY, OBA #852
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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

KIM D. ASHLEY, OBA #14175
Assistant General Counsel
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Oklahoma City, OK 73152-3248
(405) 521-3141
Attorney for Defendant,
State of Oklahoma, ex rel.
Oklahoma Tax Commission

Judgment of Foreclosure
Civil Action No. 95 C 741B

LFR:flv

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL INSURANCE COMPANY,

Plaintiff,

vs.

TRI-STATE INSURANCE COMPANY,

Defendant.

Case No. 93-C-715B
Consolidated with

CITATION OIL AND GAS CORPORATION,

Plaintiff,

vs.

TRI-STATE INSURANCE COMPANY and HEALDTON TANK TRUCK SERVICE, INC.,

Defendants.

Case No. 94-C-697-B

O R D E R

For good cause shown all claims between Tri-State Insurance Company, Citation Oil and Gas Corporation and Mitchell Tank Truck Service, formerly Healdton Tank Truck Service are dismissed with prejudice.

UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARIA SANCHEZ, an individual,	)	
Plaintiff,	)	
v.	)	Case No. 96 C 264 K
HAWKINS PRO-CUTS, INC., a Texas corporation, and BOB DANE, an individual, d/b/a ProCuts	)	JURY TRIAL DEMANDED
Defendants.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), the Plaintiff, Maria Sanchez and the Defendant, Hawkins Pro-Cuts, Inc., hereby stipulate to the dismissal with prejudice of Hawkins Pro-Cuts, Inc. from the above-styled action, each party to pay its own fees and costs, if any.

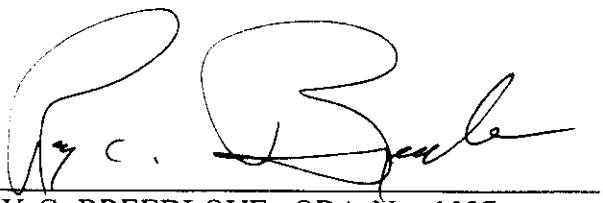
Respectfully submitted,

DOUGLAS L. INHOFE, OBA No. 4550
MARK A. WALLER, OBA No. 14831

By Mark A. Waller

INHOFE & WALLER, P. C.
907 Philtower Building
427 South Boston Avenue
Tulsa, Oklahoma 74103-4114
(918) 583-4300

Attorneys for Plaintiff
MARIA SANCHEZ



ROY C. BREEDLOVE, OBA No. 1097

FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
Sinclair Building
6 East Fifth Street, Ste. 800
Tulsa, Oklahoma 74103
(918) 599-0621

Attorneys for Defendant
HAWKINS PRO-CUTS INCORPORATED

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 30 day of May, 1996, copies of the above and foregoing document were mailed, with proper postage, to:

Mark H. Bransford, Esq.
1408 S. Denver
Tulsa, OK 74119

William Frank Carroll, Esq.
Gerald R. Groh, Esq.
Donohoe, Jameson & Carroll, P.C.
3400 Renaissance Tower
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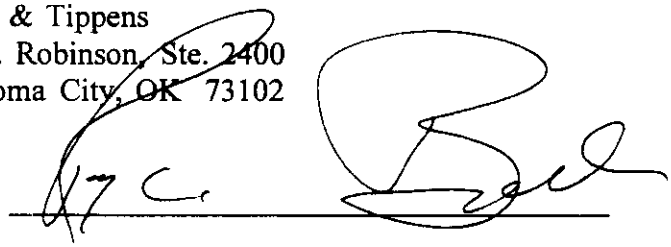
Burck Bailey, Esq.
Todd A. Nelson
Fellers, Snider, Blankenship,
Bailey & Tippens
120 N. Robinson, Ste. 2400
Oklahoma City, OK 73102



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 30 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PG&E RESOURCES, n/k/a ENSERCH EXPLORATION, INC.	)	
Plaintiff,	)	
vs.	)	Case No. 95-C-1129-K
SANGUINE, LTD.	)	
Defendant.	)	

ENTERED ON DOCKET
DATE MAY 31 1996

STIPULATION FOR DISMISSAL

IT IS HEREBY STIPULATED that the above entitled action be dismissed with prejudice as to Sanguine, LTD. and without cost to either party.

Dated May 28, 1996.

Clifford R. Cate, Jr., OBA #1563
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Attorney For Plaintiff

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Attorney For Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA WILLIS and J.B. REDUS,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**No. 95CV1106BU**
	)	
FORD MOTOR COMPANY,	)	
	)	
Defendant.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a)(1)(ii), the plaintiffs, Linda Willis and J.B. Redus, and the defendant, Ford Motor Company, hereby stipulate to the dismissal of the above-styled case with prejudice, each side to bear its own costs, if any.

Respectfully submitted,

LEBLANG & CLAY

By: Katherine T. Waller

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(918) 254-1414 Telephone

ATTORNEYS FOR PLAINTIFFS
LINDA WILLIS AND JAMES REDUS

STINSON, MAG & FIZZELL, P.C.

By: Tammy L. Womack

Tammy L. Womack MO #39012
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Kansas City, Missouri 64141-6251
(816) 842-8600 Telephone

ATTORNEYS FOR DEFENDANT
FORD MOTOR COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JEFFREY HARPER, Plaintiff,	)	
vs.	)	no. 96-C-200-K
WESTERN SUMMIT CONSTRUCTORS, INC., Defendant.	)	

JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE

Come now the Plaintiff, Jeffrey Harper, and the Defendant, Western Summit Constructors, Inc., by their respective counsel, and pursuant to Rule 41 (a)(1)(ii), hereby stipulate that the above-entitled cause be dismissed with prejudice.

ARMSTRONG, HENSLEY & LOWE

Scott L. Tully, OBA #13606
1401 South Cheyenne
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918/582-2500

ATTORNEY FOR PLAINTIFF

FELDMAN, FRANDEN, WOODARD
FARRIS & TAYLOR

By J. Derek Ingle

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ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTH DISTRICT OF OKLAHOMA

KELLY GOODWIN,

Plaintiff,

vs.

JAMES BENNETT, and PICCADILLY CAFETERIAS, INC., a corporation

Defendants.

Case No. 95 -CV-928-B

ORDER OF DISMISSAL WITH PREJUDICE

The Court, being fully advised, and based upon the agreement of the respective parties, hereby orders that all claims of Plaintiff Kelly Goodwin against Defendant James Bennett are hereby dismissed with prejudice.

Dated this 30 day of May, 1996.

THOMAS R. BRETT
CHIEF JUDGE

APPROVED AS TO FORM
AND CONTENT:

Charles W. Wright, OBA #11019
Attorney for Plaintiff
Kelly Goodwin

Michael J. Gibbens, OBA #3339
Attorney for Defendant
James Bennett

125618.KERRM

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE FARM FIRE AND CASUALTY COMPANY,	)	
Plaintiff,	)	
vs.	)	Case No. 95-C-237-BU
VALORIE BARRETT and ANTHONY BARRETT,	)	
Defendants.	)	

JUDGMENT

On the 20th day of May, 1996, this action came on for trial before the Court and a jury, Honorable Michael Burrage, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict on May 28, 1996, which is attached hereto as Exhibit 1 and made a part hereof, it is

ORDERED, ADJUDGED AND DECREED that the plaintiff State Farm Fire and Casualty Company recover of the defendants Valorie Barrett and Anthony Barrett the sum of $23,459.24, with interest thereon at a rate of 5.62 percent as provided by law and its costs of action; and defendant Valorie Barrett takes nothing by way of her counterclaims

Dated at Tulsa, Oklahoma, this 30th day of May, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

SELMAN AND STAUFFER, INC.

By: _____
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KENT B. RAINEY, OBA #14619
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ATTORNEYS FOR PLAINTIFF.

JONES, GIVENS, GOTCHER & BOGAN

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Donald O'Dell, Esq.
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ATTORNEYS FOR DEFENDANTS.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

STATE FARM FIRE AND CASUALTY COMPANY,	)	
Plaintiff,	)	
vs.	)	Case No. 95-C-237-BU
VALORIE BARRETT and ANTHONY BARRETT,	)	
Defendants.	)	

VERDICT

Please Answer All the Questions in Part I:

Part I:

1. Do you find that the plaintiff, State Farm Fire and Casualty Company, has proven by a greater weight of the evidence its allegation that either of the defendants, Valorie Barrett and Anthony Barrett, caused or procured the fire loss to the real and personal property covered under the insurance policy for the purpose of obtaining insurance benefits?

Yes _____ No ✓

2. Do you find that the plaintiff, State Farm Fire and Casualty Company, has proven by a greater weight of the evidence its allegation that either of the defendants, Valorie Barrett and Anthony Barrett, intentionally concealed the cause of the fire?

Yes _____ No ✓

3. Do you find that the plaintiff, State Farm Fire and Casualty Company, has proven by a greater weight of the evidence its allegation that either of the defendants, Valorie Barrett and Anthony Barrett, made intentional and material misrepresentations on the Sworn Statement in Proof of Loss as to the cause of the fire?

Yes _____ No ✓

4. Do you find that the plaintiff, State Farm Fire and Casualty Company, has proven by a greater weight of the evidence its allegation that either of the defendants, Valorie

Barrett and Anthony Barrett, made intentional and material misrepresentations concerning their activities at the time of the fire?

Yes _____ No ✓

5. Do you find that the plaintiff, State Farm Fire and Casualty Company, has proven by a greater weight of the evidence its allegation that either of the defendants, Valorie Barrett and Anthony Barrett, made intentional and material misrepresentations concerning their financial condition at the time of the fire?

Yes ✓ No _____

6. Do you find that the plaintiff, State Farm Fire and Casualty Company, has proven by a greater weight of the evidence its allegation that either of the defendants, Valorie Barrett and Anthony Barrett, made intentional and material concealments in the presentation of their insurance claim?

Yes _____ No ✓

7. Do you find that the plaintiff, State Farm Fire and Casualty Company, has proven by a greater weight of the evidence its allegation that either of the defendants, Valorie Barrett and Anthony Barrett, breached the implied covenant of good faith and fair dealing owed by them to the plaintiff, State Farm Fire and Casualty Company?

Yes ✓ No _____

Complete Part II ONLY if You Have Answered "Yes" to Any of the Questions in Part I. After You Have Completed Part II, Please Have Your Foreperson Date and Sign this Verdict. Do Not Proceed to Part III.

Part II:

We, the jury, find the damages incurred by the plaintiff, State Farm Fire and Casualty Company, as a result of the actions or omissions by either of the defendants, Valorie Barrett and Anthony Barrett, to be in the amount of

$13,459.24

Edgar D Hutchinson

5-28-96

Complete Part III ONLY if You Have Answered "No" to All Questions in Part I.

Part III:

_____ **We, the jury, on the defendant, Valorie Barrett's counterclaim of breach of contract, find for the defendant, Valorie Barrett, and against the plaintiff, State Farm Fire and Casualty Company.**

OR

_____ **We, the jury, on the defendant, Valorie Barrett's counterclaim of breach of contract, find for the plaintiff, State Farm Fire and Casualty Company, and against the defendant, Valorie Barrett.**

Complete Part IV ONLY if You Found for the Defendant in Part III on the Counterclaim of Breach of Contract.

Part IV:

We, the jury, award actual damages to the defendant, Valorie Barrett, for the fire loss to the personal property in the

amount of $_____.

Complete Part V ONLY if You Have Answered "No" to All Questions in Part I.

Part V:

_____ We, the jury, on the defendant, Valorie Barrett's counterclaim of breach of obligation of good faith and fair dealing, find for the defendant, Valorie Barrett, and against the plaintiff, State Farm Fire and Casualty Company.

OR

_____ We, the jury, on the defendant, Valorie Barrett's counterclaim of breach of obligation of good faith and fair dealing, find for the plaintiff, State Farm Fire and Casualty Company, and against the defendant, Valorie Barrett.

Complete Part VI ONLY if You Found for the Defendant in Part V. If You Have Previously Found In Favor of the Defendant on Her Counterclaim of Breach of Contract and Have Awarded Her Damages for the Loss of Her Personal Property, Do Not Include

This Figure in Your Damage Award, If Any, For Her Counterclaim of Breach of Obligation of Good Faith and Fair Dealing.

Part VI:

___ We, the jury, award actual damages to the defendant,

Valorie Barrett, in the amount of $_____.

_____ _____

Date **Foreperson**

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEVE ENRIQUEZ and CHERYL ENRIQUEZ,

Plaintiffs,

vs.

BLUE CROSS AND BLUE SHIELD OF OKLAHOMA, Individually and as trade name for GROUP HEALTH INSURANCE OF OKLAHOMA, INC., d/b/a BLUELINCS HMO,

Defendant.

Case No. 96-C-435-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 30th day of May, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 30 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHRISTIANA OSSOM,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Insurance Corporation, and STATE FARM FIRE AND CASUALTY COMPANY, an Illinois Insurance Corporation,

Defendants.

No. 96-C-0126B

ENTERED ON DOCKET
DATE MAY 31 1996

ORDER OF DISMISSAL WITHOUT PREJUDICE

NOW ON this 29 day of May, 1996, for good cause shown, State Farm Mutual Automobile Insurance Company is hereby dismissed from this action without prejudice.

S/ THOMAS R. BRETT

Thomas R. Brett
Judge of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROSE MARY SMITH, personal representative of Randy Leon Smith,

Plaintiff,

v.

THE CITY OF TULSA, OKLAHOMA, a municipal corporation; EDWARD BUCKSPAN, individually and in his official capacity as a police officer in the City of Tulsa; and RON PALMER, in his official capacity as Chief of Police of the City of Tulsa,

Defendants.

Case No. 95-C-671-H

ORDER

This matter comes before the Court on Defendants' Motion for Summary Judgment (Docket #12).

Plaintiff brought this action alleging claims pursuant to 42 U.S.C. § 1983 and state common law as the result of her son's death in 1994. Defendants filed this motion for summary judgment on April 8, 1996. Plaintiff's response to the motion was originally due on April 23, 1996. Plaintiff did not file a response but did file a motion to dismiss the case without prejudice (Docket #15).

Although the Court has discretion to dismiss an action without prejudice after the filing of a responsive pleading, Fed. R. Civ. P. 41(a)(2), the Court determined that dismissal without prejudice would be improper in the instant case. At the Pretrial Conference held on May 17, 1996, the Court denied Plaintiff's motion on the grounds that Defendants have filed a summary judgment motion and

that the trial in the matter was scheduled for June 17, 1996. At that time, the Court ordered Plaintiff to respond to Defendants' motion for summary judgment on or before May 24, 1996. To date, Plaintiff has failed to file such a response.

Under Local Rule 7.1(D), "[f]ailure to timely respond [to a motion] will authorize the Court, in its discretion, to deem the matter confessed, and enter the relief requested." Further, based upon a review of the record and the brief of Defendants, the Court concludes that summary judgment in favor of Defendants is appropriate on the merits.

Accordingly, Defendants' Motion for Summary Judgment (Docket #12) is hereby granted.

IT IS SO ORDERED.

This 30TH day of May, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROSE MARY SMITH, personal representative of Randy Leon Smith,

Plaintiff,

v.

THE CITY OF TULSA, OKLAHOMA, a municipal corporation; EDWARD BUCKSPAN, individually and in his official capacity as a police officer in the City of Tulsa; and RON PALMER, in his official capacity as Chief of Police of the City of Tulsa,

Defendants.

Case No. 95-C-671-H

JUDGMENT

This Court entered an order on May 30, 1996, granting summary judgment in favor of Defendants.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendants and against Plaintiff.

IT IS SO ORDERED.

This 30TH day of May, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Great Entertainment Merchandise, Inc.	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 94cv44-BU
Phyllis C. Stuck and Magic Fashions & Screen Print, Inc. and Anthony Caterine	)	
Defendants.	)	

AGREED ORDER OF JUDGMENT

This matter came on for hearing before the Court on May 17, 1996 on Plaintiff's Motion for Attorneys' Fees, Treble Damages and Permanent Injunction. The Court, having read the briefs of the parties and listened to oral argument renders the following decision:

IT IS HEREBY ORDERED:

(1) A permanent injunction shall issue against all of the defendants, their agents, employees enjoining any and all of them from selling merchandise bearing the name, trademark and likeness of Billy Ray Cyrus.

(2) The plaintiff will be awarded attorneys' fees; however the hourly rate allowed for Mr. Feiswog will be reduced to $150.00. Thus, the total attorneys' fees allowed is $22,954.95.

(3) The compensatory damages will be trebled to $9,000.00.

(4) The punitive damages have been awarded in the amount of $3,000.00.

(5) Costs have been awarded in the amount of $1,634.00.

The total Monetary value of this judgment comes to **$36,588.95** which is assessed against the defendants jointly and severally.

IT IS SO ORDERED

S/ SVEN ERIK HOLMES

MAY 30, 1996
Date

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM;

William S. Dorman
Attorney for Plaintiff

C. Rabon Martin
Mitchell M. McCune
Atorneys for defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEITH PICKENS,

Plaintiff,

BUDDY'S PRODUCE OF TULSA, L.L.C., an Oklahoma Limited Liability Company,

Defendant.

ENTERED ON DOCKET
DATE MAY 30 1996

Case No. 95 C 1218 H

FILED

MAY 30 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF JUDGMENT

NOW on this 30TH day of MAY, 1996, it appearing to the Court that the Clerk has determined that the Defendant, BUDDY'S PRODUCE OF TULSA, L.L.C., An Oklahoma Limited Liability Company, is in default in these proceedings by failing to respond to the Complaint filed herein by the Plaintiff; and it further appearing to the Court that, after the determination of default was made, the Plaintiff has filed its Motion requesting default judgment against the Defendant, supported by an Affidavit concerning the amount of damages to which Plaintiff is entitled. The Court, after examining the file and the Affidavit in support of the Motion for Default Judgment, finds that the Plaintiff, KEITH PICKENS, is entitled to judgment against the Defendant, BUDDY'S PRODUCE OF TULSA, L.L.C., An Oklahoma Limited Liability Company, in the amount of $4,173.75.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, KEITH PICKENS, is granted judgment against the Defendant, BUDDY'S PRODUCE OF TULSA, L.L.C., An Oklahoma Limited Liability Company, in the amount of $4,173.75 for all of which let

execution be issued. Pursuant to Local Rules 54.1 and 54.2, Plaintiff is granted fourteen (14) days to file its request to have costs assessed against the Defendant herein.

S/ SVEN ERIK HOLMES

JUDGE, UNITED STATES DISTRICT COURT

H. I. ASTON OBA #362
Attorney for Plaintiff
3242 East 30th Place
Tulsa, Oklahoma 74114-5831
(918) 745-8523

CERTIFICATE OF MAILING

I hereby certify that, on the _____ day of May, 1996, I mailed a true and correct copy of the above and foregoing Order of Judgment to BUDDY'S PRODUCE OF TULSA, L.L.C., an Oklahoma Limited Liability Company,, c/o Ms. Anita Stover, 1307 S.W. Second Street, Oklahoma City, Oklahoma Oklahoma 73108, with sufficient postage thereon fully prepaid.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DON BLANKENSHIP,

Plaintiff,

v.

BUCK JOHNSON, et al.,

Defendants.

Case No. 95-CV-148-H

ORDER

The Court scheduled a case management conference in the instant lawsuit for August 11, 1995 and notified all parties. Plaintiff's attorney, however, failed to appear in direct contravention of Northern District Local Rule 16.1(A). At the conference, the Court informed Defendants' counsel that the case would be dismissed. After further consideration, the Court has determined that the case should be dismissed without prejudice.

IT IS SO ORDERED.

This 30th day of May, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES WILSON and PATRICIA WILSON, as parents and next friends of Brian Wilson, a minor, and Charles and Patricia Wilson, individually,

Plaintiffs,

v.

MERRELL DOW PHARMACEUTICALS, INC.,

Defendant.

Case No. 82-CV-710-H

JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on May 28, 1996.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiffs.

IT IS SO ORDERED.

This 30TH day of May, 1996.

Sven Erik Holmes
United States District Judge

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. RUSSELL W. INDERMILL; ROXANNE M. INDERMILL; GILCREASE HILLS HOMEOWNER'S ASSOCIATION; MARTHA LEGGINS; COUNTY TREASURER, Osage County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, Defendants.	)	ENTERED ON DOCKET DATE MAY 30 1996 F I L E D MAY 29 1996 Phil Lombardi, Clerk U.S. DISTRICT COURT Civil Case No. 95cv 996K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28 day of May, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Osage County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, appear by John S. Boggs, Jr., Assistant District Attorney, Osage County, Oklahoma; and the Defendants, RUSSELL W. INDERMILL, ROXANNE M. INDERMILL, GILCREASE HILLS HOMEOWNER'S ASSOCIATION and MARTHA LEGGINS, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, GILCREASE HILLS HOMEOWNER'S ASSOCIATION, acknowledged receipt of Summons and Complaint on March 7, 1996, by Certified Mail; that Defendant, COUNTY TREASURER, Osage County, Oklahoma, acknowledged receipt of Summons and Complaint

on October 5, 1995, by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, acknowledged receipt of Summons and Complaint on October 5, 1995, by Certified Mail.

The Court further finds that the Defendants, RUSSELL W. INDERMILL, ROXANNE M. INDERMILL and MARTHA LEGGINS, were served by publishing notice of this action in the Pawhuska Journal-Capital, a newspaper of general circulation in Osage County, Oklahoma, once a week for six (6) consecutive weeks beginning January 6, 1996, and continuing through February 10, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, RUSSELL W. INDERMILL, ROXANNE M. INDERMILL and MARTHA LEGGINS, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, RUSSELL W. INDERMILL, ROXANNE M. INDERMILL and MARTHA LEGGINS. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in

ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Osage County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, filed their Answer on October 17, 1995; and that the Defendants, RUSSELL W. INDERMILL, ROXANNE M. INDERMILL, MARTHA LEGGINS and GILCREASE HILLS HOMEOWNER'S ASSOCIATION, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, RUSSELL W. INDERMILL and ROXANNE M. INDERMILL, were granted a Divorce on December 18, 1992, in Case No. JFD-91-266, in Osage County, Oklahoma. The Defendant, ROXANNE INDERMILL, is a single unmarried person.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Osage County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Nine (9), Block Eleven (11), GILCREASE HILLS VILLAGE II, BLOCKS 11 AND 12, a Subdivision of Osage County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on January 30, 1989, the Defendants, RUSSELL W. INDERMILL and ROXANNE M. INDERMILL, executed and delivered to OAK TREE

MORTGAGE CORPORATION, their mortgage note in the amount of $63,214.00, payable in monthly installments, with interest thereon at the rate of 8.830 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, RUSSELL W. INDERMILL and ROXANNE M. INDERMILL, husband and wife, executed and delivered to OAK TREE MORTGAGE CORPORATION, a mortgage dated January 30, 1989, covering the above-described property. Said mortgage was recorded on February 1, 1989, in Book 748, Page 712, in the records of Osage County, Oklahoma.

The Court further finds that on November 2, 1989, OAK TREE MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on November 6, 1989, in Book 763, Page 131, in the records of Osage County, Oklahoma.

The Court further finds that on December 1, 1989, the Defendants, RUSSELL W. INDERMILL and ROXANNE M. INDERMILL, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on January 1, 1991, November 1, 1991 and December 1, 1992.

The Court further finds that the Defendants, RUSSELL W. INDERMILL and ROXANNE M. INDERMILL, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and

that by reason thereof the Defendants, RUSSELL W. INDERMILL and ROXANNE M. INDERMILL, are indebted to the Plaintiff in the principal sum of $93,340.24, plus interest at the rate of 8.83 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, RUSSELL W. INDERMILL, ROXANNE M. INDERMILL, MARTHA LEGGINS and GILCREASE HILLS HOMEOWNER'S ASSOCIATION, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, RUSSELL W. INDERMILL and ROXANNE M. INDERMILL, in the principal sum of $93,340.24, plus interest at the rate of 8.83 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, RUSSELL W. INDERMILL, ROXANNE M. INDERMILL, MARTHA LEGGINS, GILCREASE HILLS HOMEOWNER'S ASSOCIATION, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, RUSSELL W. INDERMILL and ROXANNE M. INDERMILL, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right

to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

JOHN S. BOGGS, JR. OBA #0920
Assistant District Attorney
District Attorneys Office
Osage County Courthouse
Pawhuska, OK 74056
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Osage County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95cv 996K

LFR:flv

IN THE UNITED STATES COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BS&B SAFETY SYSTEMS, INC.

Plaintiff,

v.

CONTINENTAL DISC CORPORATION,

Defendant.

CASE NO. 94-C-1027-H

REPORT AND RECOMMENDATION

Before the Court for Report and Recommendation is Continental Disc Corporation's (CDC) MOTION TO VACATE ORDER EXCLUDING CDC'S INVALIDITY/UNENFORCEABILITY DEFENSES [Dkt. 278]. By its motion, CDC seeks to have the Court vacate its Order of November 21, 1995 [Dkt. 230], which adopted the undersigned Magistrate Judge's Report and Recommendation of October 23, 1995 [Dkt. 198], striking CDC's invalidity/unenforceability defenses.

CDC's motion to vacate is the fourth in a series of attempts to have this Court alter its original decision [Dkt. Nos. 219, 220, 223]. A hearing on CDC's motion was held on May 17, 1996 at which time CDC substantially reduced the scope of its request regarding introduction of evidence relating to invalidity/unenforceability. CDC now requests only that the Court permit it to present evidence that the BS&B '133 Patent is invalid under 35 U.S.C. § 102, based upon the prior art Mozley Patent 4,669,626 which was issued prior to BS&B's '133 Patent. [See CDC's Supplement to its motion filed 5/20/96; Dkt. 303]. CDC requests that it be permitted to present three witnesses to testify regarding the Mozley '626 patent and asserts that the

testimony will only add half a day to the trial of this case. BS&B vigorously argues that a substantial increase in trial time would result.

Since the current motion is essentially a motion to reconsider the prior Report and Recommendation issued by the undersigned Magistrate Judge, familiarity with that Report and Recommendation is presumed. CDC makes no assertion of any factual inaccuracies in that Report and Recommendation.

Although CDC states in its opening memorandum that the "new undersigned counsel for CDC" has reviewed the prior order of the Court and the transcripts of the various hearings held, the Court notes that while counsel may not have been taking an active role as lead counsel, the "new" counsel for CDC has been attorney of record for CDC in this case since December 5, 1994. [Dkt. 6]. The significance of this fact lies in the inference presented by CDC that its current lead counsel were unaware of the conduct of the defense in this case and that they should receive some relief from the results of the actions of their predecessor as lead counsel. The Court finds this argument to be without merit in light of current lead counsel's appearance almost since the inception of this case.

The Court considers CDC's Motion to Vacate to be a matter resting within the sound discretion of the Court and one where the Court should determine whether relief is justified in the interest of justice.[1]

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[1] The Court is specifically not relying upon the "extraordinary procedure" for relief from final judgments or orders found in Fed. R. Civ. P. 60(b). See *Wright & Miller,* § 2852.

CDC's request to vacate the prior order is based on three reasons:

1. This Court's summary judgment ruling holding that the indentations in CDC's accused rupture discs are embossments within the meaning of the claims of the '133 patent renders the '133 patent invalid.

2. CDC's invalidity defense should be heard because of overriding public policy considerations.

3. Continuation of the trial date to August 19, 1996 removed any prejudice to BS&B caused by CDC's failure to disclose its invalidity defenses.

Before discussing the three bases to vacate the order urged by CDC, it is important to consider the nature of CDC's alleged invalidity defense. CDC has claimed since the beginning of this litigation, and continues to claim, that its accused products contain indentations which weaken the rupture disc. The '133 patent specifically requires that the embossments be reinforcing in nature, not weakening. Therefore, CDC's assertion that its products do not contain reinforcing indentations/embossments is essential to its infringement defense. However, this contention directly contradicts CDC's assertion that it has a strong invalidity defense based upon prior art.

CDC's invalidity defense is premised on the existence of the Mozley '626 patent and discs developed from that patent, which pre-date the '133 patent application date. However, absent a finding that the indentation/embossments reinforce, CDC would not assert the Mozley '626 patent as prior art. It is only in the context of an adverse factual finding concerning reinforcement that the Mozley '626 patent as prior art defense becomes viable. What CDC is really saying is that: If the fact finder should

reject CDC's position and conclude that the indentations/embossments of its accused products reinforce, then that same finding should be applied to its earlier Mozley '626 patent which would invalidate BS&B's '133 patent. In other words, CDC's entire "Mozley '626 patent as prior art" invalidity defense is CDC's attempt to hedge its bets to protect itself from an adverse factual finding. Under usual circumstances CDC would be perfectly entitled to take such alternative positions. But, this option was eliminated by the Court's prior order.

With this background in mind the Court now turns to CDC's three specific bases for relief.

CDC'S ASSERTION THAT THIS COURT'S SUMMARY JUDGMENT ORDER RENDERS THE '133 PATENT INVALID

Curiously, CDC asserts that this Court's finding that the indentations on CDC's accused products constitute embossments within the meaning of the BS&B '133 patent renders the '133 patent invalid. This assertion is simply not accurate. CDC ignores one of the remaining core issues in this case, that being the reinforcing characteristic of the embossments claimed by BS&B in its '133 patent. If CDC's accused products do not have reinforcing embossments, they do not infringe the '133 patent and they do not constitute prior art to the '133 patent. Therefore, the Court's ruling that the indentations in CDC's accused products constitute embossments within the meaning of the '133 patent does not render the '133 patent invalid. The factual question of whether the indentations reinforce remains open. Additionally, there are

other elements of the '133 patent claims which were not disposed of by the summary judgment rulings, e.g. "thickness".

CDC's assertion that the Court's summary judgment ruling is a new circumstance that changes the complexion of the case is likewise unavailing. BS&B has always asserted that "embossment" included CDC's indentations. CDC has known from the beginning of this litigation that at some point either the Court[2] or the jury was going to construe the meaning of the term "embossment". By determining that the '133 patent "embossments" include CDC's indentations, the Court has not created a new circumstance that somehow renders the Court's prior order unjust.

Furthermore, even if the Court were to assume that the indentations/embossments in CDC's accused products are reinforcing, and that they contain the remaining unresolved elements of the claims in the '133 patent, it does not necessarily follow that CDC's products under the Mozley '626 patent would constitute prior art. There are numerous factual issues in that regard undeveloped and unresolved by this record. The reason those issues are undeveloped and unresolved relates back to CDC's actions which resulted in the exclusion of its invalidity defenses: CDC failed to timely assert an invalidity defense based upon the Mozley '626 patent so that the basis therefore could be developed in discovery.

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[2] *Markman v. Westview Instruments, Inc.*, 1996 WL 190818 (U.S. April 23, 1996) (holding that claim construction was an issue for the Court was decided during the pendency of this case).

In light of the foregoing, the Court's summary judgment rulings do not constitute a basis to vacate the subject exclusion order.

CDC'S ASSERTION OF A STRONG PUBLIC POLICY IN PROMOTING CHALLENGES TO THE VALIDITY OF PATENTS

This Court does not in any way minimize the strong public policy in promoting challenges to the validity of patents. The Court does however assert that there is also a strong public policy in the efficient management of complicated litigation before the federal courts. See generally, *Manual for Complex Litigation Third,* § *20.1 and Advisory Committee Comments to Fed. R. Civ. P. 16 and 37.* The goal of efficient management of litigation brought in federal court cannot be achieved when a party does not adhere to rules and orders directed toward that purpose.

In urging the Court to vacate its prior order to enable CDC to present invalidity as an alternative position, it is unpersuasive for CDC to assert that it has a strong invalidity defense which impacts the public interest. There is slight public interest in allowing CDC to challenge the validity of the '133 patent based upon the Mozley '626 patent when CDC's position is that the Mozley '626 patent does not describe the invention claimed in the '133 patent. According to CDC, the invention described in the Mozley '626 patent has weakening indentations/embossments, rather than the reinforcing indentation/embossments claimed in the BS&B '133 patent. This functional difference prevents the Mozley '626 patent from being prior art to the '133 patent.

Outside of the context of this litigation, CDC does not maintain that the Mozley '626 patent is prior art to the '133 patent. Thus, CDC champions not a "public

policy" argument at all, but rather a "CDC policy" argument. CDC's Mozley '626 patent as prior art invalidity defense is only an alternative theory to shield itself against possible rejection of its position by the fact finder, resulting in a finding that its indentations/embossments are reinforcing. CDC's public interest argument is illusory.

As pointed out by BS&B in its response, if CDC chooses to assert the public interest in challenging the validity of BS&B's '133 patent, a reexamination request to the patent office is available at any time. Of course, CDC will not seek a reexamination because it will never take the position that its indentations/embossments reinforce. In addition, the outcome of this suit presents no impediment for others in the marketplace to challenge the validity of BS&B's '133 patent either before the patent office or in Court.

CDC's public policy argument relies heavily upon 35 U.S.C. § 282 and *Donnelly Corp. v. Gentex Corp.*, 37 USPQ 2d 1146 (W.D. Mich. 1995). In its prior Report and Recommendation, this Court addressed the application of Section 282 to this litigation. The Court will only add that while it found that Section 282 did not "trump" the Federal Rules of Civil Procedure regarding case management, this Court can conceive of factual situations where the congressional mandate of Section 282 would require the Court to exercise its discretion and allow the late addition of prior art to litigation even beyond its scheduling deadlines. The *Donnelly* case presented such a factual situation.

In *Donnelly*, the defendant acquired a piece of prior art through a most circuitous route and submitted it in support of its motion for summary judgment after the

scheduling deadlines established by the Court. There was no serious question in the *Donnelly* case but that the defendant was unaware of this prior art until after the discovery deadline and that the defendant promptly submitted the prior art to the plaintiff. The *Donnelly* court framed the issue as follows: "...whether this court can preclude defendant from presenting the newly discovered prior art..." Despite the fact of Defendant's discovery of the prior art after the close of discovery, the Court in *Donnelly* continued to keep under advisement a possible $250,000 sanction against the defendant for the late disclosure of the prior art, implying that perhaps the defendant had not been diligent enough in attempting to identify all of the prior art in the area.

In contrast to that factual situation, in our present case CDC was aware of the alleged prior art from before the date this lawsuit was filed. That is so because the Mozley '626 patent belongs to CDC.

The Court concludes that while CDC's invalidity defense may be strong in an abstract sense, it is not strong from a public policy standpoint. In reaching this conclusion, the Court in no way prejudges or comments upon the underlying merit of either party's assertions with regard to the issues of infringement. CDC continues to have at its disposal a number of defenses to infringement, only one of which is the issue of reinforcement.

CDC'S ASSERTION OF A LACK OF PREJUDICE TO BS&B

CDC's assertion that there will be no prejudice to BS&B based upon the trial continuance is factually little different at this time than it was upon the issuing of the

original Report and Recommendation or upon the earlier denials of CDC's requests to reconsider that order. If the Court were to vacate its prior order, BS&B would be forced to conduct discovery in the remaining weeks before trial on a subject about which it diligently attempted to conduct discovery during the many months of discovery scheduled by the Court, to no avail. BS&B's compliance with numerous pre-trial deadlines [R. 263] and its trial preparation would be interrupted. Based upon the facts revealed during the invalidity discovery, additional exhibits and witnesses might need to be added, all of which could result in yet another continuance of the trial, a circumstance BS&B has always claimed to be prejudicial.

The Court therefore concludes that the alleged lack of prejudice to BS&B does not support vacating its prior order.

In reaching the conclusion that the Court should not recommend vacating the exclusion order, this Court has given very serious consideration to any lessor sanction which might balance the conduct resulting in the sanction, the prejudice to BS&B and this Court's overriding concern with discovering the truth. Among the alternatives considered, was requiring CDC to pay all of BS&B's costs and attorneys fees in relation to any additional discovery necessitated by reinserting the invalidity defense into the litigation. However, such a solution does not solve the problem of interruption to BS&B's trial preparation or the very real possibility that this additional discovery would result in the addition of witnesses and exhibits necessitating further continuance of the trial. Moreover, the Court once again returns to the requirement that both sides adhere to the rules thereby assuring a level playing field for the resolution of disputes.

This Court's reluctance to impose sanctions, especially sanctions that might deprive the jury of all of the relevant information to decide a case, is evidenced by the Court's refusal to strike CDC's expert witnesses, as requested by BS&B, for their failure to file proper Rule 26 expert reports and this Court's allowing CDC to present evidence of testing of the products at issue which was done arguably outside the time limits imposed by the Court. However, the Court is constrained to conclude, based upon the record before it, that the original Report and Recommendation recommending that the invalidity defenses of CDC be stricken from this case, which Report and Recommendation was affirmed by the District Court, not be vacated.

It is therefore respectfully recommended that CDC's MOTION TO VACATE ORDER EXCLUDING CDC'S INVALIDITY/UNENFORCEABILITY DEFENSES [Dkt. 278] BE **DENIED.**

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this Report. Failure to file objections within the time specified waives the right to appeal from a judgment of the district court based upon the findings and recommendations of the United States Magistrate Judge. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

Dated this 28th day of MAY, 1996.

Frank H McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

6.1 - S:\BS&B.278

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff,

v.

PAUL D. HINCH, individually, et. al.,

Defendants,

v.

BANK ONE TEXAS, N.A., THE RESOLUTION TRUST CORPORATION, and GOVERNMENT FINANCIAL SERVICES, L.L.C.,

Third-Party Defendants.

Case No. 94-C-728-H
95-C-1249-H
(Consolidated)

ADMINISTRATIVE CLOSING ORDER

The Defendant Paul D. Hinch having filed his petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the Parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, within sixty days of a final adjudication of the bankruptcy proceedings, the Parties have not reopened for the purpose of obtaining final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 30TH day of May, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHIEF SUPPLY CORPORATION, an Oklahoma corporation,

Plaintiff,

v.

PERMA-FIX OF DAYTON, INC.; PERMA-FIX OF MEMPHIS, INC.; and PERMA-FIX OF FLORIDA, INC., foreign corporations,

Defendants.

Case No. 95-C-796-H

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by July 1, 1996, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 29TH day of May, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMERICAN BUILDERS & CONTRACTORS SUPPLY CO., INC. d/b/a ABC SUPPLY CO., INC.,	]	
Plaintiff,	]	FILED
vs.	]	MAY 30 1996
CHARLES THOMAS BURNS, DIANA BURNS a/k/a DIANA L. BURNS, LAKESIDE BANK OF SALINA, MAR ARTHUR CO., STATE OF OKLAHOMA, ex rel, OKLAHOMA TAX COMMISSION, TREASURER OF MAYES COUNTY, STATE OF OKLAHOMA and BOARD OF COUNTY COMMISSIONERS OF MAYES COUNTY, STATE OF OKLAHOMA,	]	Phil Lombardi, Clerk U.S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA
	]	ENTERED ON DOCKET
	]	DATE MAY 30 1996
Defendants.	]	Case No. 94-C 1173B

JOURNAL ENTRY OF JUDGMENT AND
DECREE OF FORECLOSURE

THIS MATTER comes on for hearing this 30TH day of May, 1996, before the undersigned Judge.

The Plaintiff, AMERICAN BUILDERS & CONTRACTORS SUPPLY CO., INC. d/b/a ABC SUPPLY CO., INC., appears by and through its attorney, DOUGLAS R. HAUGHEY; the Defendant, CHARLES THOMAS BURNS appears by and through his attorney, TERRY P. MALLOY, and JOSEPH Q. ADAMS, Trustee; this Defendant, LAKESIDE BANK OF SALINA, [hereinafter referred to as BANK] appears by and through its attorney, FRED H. SORDAHL; the Defendant, DIANA BURNS a/k/a DIANA L. BURNS, appears by and through her attorney, RANDALL ELLIOTT; the Defendant, MAC ARTHUR CO., appears by and through its attorney, GARY J. DEAN; the STATE OF OKLAHOMA, ex rel, OKLAHOMA TAX COMMISSION, appears by and through its attorney; the Defendants,

BLEVINS & SORDAHL, INC.
ATTORNEYS AT LAW
BOX 870
ADAIR
, OK 74362
(918) 825-4750

TREASURER OF MAYES COUNTY, STATE OF OKLAHOMA, and BOARD OF COUNTY COMMISSIONERS OF MAYES COUNTY, STATE OF OKLAHOMA, appear by and through their attorney, GENE HAYNES, District Attorney.

The Court having heard the statements of counsel and the evidence presented from witnesses duly sworn and examined, and being fully advised in the premises, FINDS:

1. That the Defendant BANK is a corporation, organized and existing under and by virtue of the laws of the State of Oklahoma, with its office and principal place of business located in the Town of Salina, Mayes County, State of Oklahoma.

2. That on the 14th day of May, 1993, the Defendants, CHARLES THOMAS BURNS and DIANA L. BURNS, made, executed and delivered to Defendant BANK a certain Promissory Note for the principal sum of $26,436.86, with principal and interest payable pursuant to the terms of said note.

3. That as part and parcel of said transaction and for the purpose of securing payment of the abovementioned promissory note, the Defendants, CHARLES THOMAS BURNS and DIANA L. BURNS, husband and wife, made, executed and delivered to Defendant BANK a real estate mortgage covering the following described real estate situated in Mayes County, Oklahoma, to-wit:

> The South Half of the Northeast Quarter of the Northwest Quarter ($S\frac{1}{2}$ $NE\frac{1}{4}$ $NW\frac{1}{4}$) and the Southeast Quarter of the Northwest Quarter of the Northwest Quarter ($SE\frac{1}{4}$ $NW\frac{1}{4}$ $NW\frac{1}{4}$) and the Northwest Quarter of the Southeast Quarter of the Northwest Quarter ($NW\frac{1}{4}$ $SE\frac{1}{4}$ $NW\frac{1}{4}$) of Section Thirteen (13), Township Twenty-one (21) North, Range Twenty (20) East of the Indian Base and Meridian, Mayes County, State of Oklahoma LESS AND EXCEPT the following tract:
>
> All that part of the $S\frac{1}{2}$ $NW\frac{1}{4}$ $SE\frac{1}{4}$ $NW\frac{1}{4}$ lying North of the

Mayes County road right-of-way in Section 13, Township 21 North, Range 20 East being more particularly described as follows, to-wit: Beginning at a point where the Northerly right-of-way line of said Mayes County Road intersects the Easterly line of said S½ NW¼ SE¼ NW¼ of Section 13; thence Northerly along the Easterly line of said S½ NW¼ SE¼ NW¼ of Section 13 to the Northeast corner thereof; thence Westerly along the Northerly line of said S½ NW¼ SE¼ NW¼ of Section 13 to the Northwest corner thereof; thence Southerly along the Westerly line of said S½ NW¼ SE¼ NW¼ to a point on the Northerly right-of-way line of said Mayes County road; thence Easterly along the Northerly right-of-way line of said Mayes County to a point on the Easterly line of said S½ NW¼ SE¼ NW¼ of Section 13.

Said mortgage was duly recorded in Book 762 at Page 456 in the office of the County Clerk of Mayes County, Oklahoma, on May 20, 1993, and after the required mortgage tax was paid.

4. That default has been made on the above referred note and mortgage in that the mortgagors have failed to discharge certain levies, liens, attachments and other claims which have been asserted against the mortgaged property and there remains due and unpaid upon said note and mortgage the principal sum of $27,849.37 plus interest accrued to March 9, 1995, in the amount of $2,528.23, and interest accruing at the per diem rate of $9.531, which sums are just, due and unpaid, and by the terms of said note and mortgage, Defendant BANK is entitled to declare the above balance immediately due and payable, together with interest thereon, which is also due and payable, until paid, to collect a reasonable attorney's fee and all costs of this action.

5. That by reason of the premises and by the default of the Defendants, CHARLES THOMAS BURNS and DIANA L. BURNS, husband and wife, the Defendant BANK is entitled to judgment and foreclosure of

the mortgage of said premises and have the same sold with appraisement to satisfy said indebtedness, if not paid.

IT IS THEREFORE THE ORDER, JUDGMENT AND DECREE of this Court that the Defendant BANK have and recover judgment in rem against the Defendants, CHARLES THOMAS BURNS, DIANA BURNS a/k/a DIANA L. BURNS, MAC ARTHUR CO., STATE OF OKLAHOMA, ex rel, OKLAHOMA TAX COMMISSION; and TREASURER OF MAYES COUNTY, STATE OF OKLAHOMA, BOARD OF COUNTY COMMISSIONERS OF MAYES COUNTY, STATE OF OKLAHOMA, and the Plaintiff, AMERICAN BUILDERS & CONTRACTORS SUPPLY CO., INC. d/b/a ABC SUPPLY CO., IN., for the principal sum of $27,849.37, plus interest accrued to March 9, 1995 in the sum of $2,528.23, and interest accruing thereon at the per diem rate of $9.531, until paid, all as provided in said note and mortgage, together with all costs of this action.

IT IS THE FURTHER ORDER, JUDGMENT AND DECREE of this Court that upon the failure of the Defendants, CHARLES THOMAS BURNS and DIANA L. BURNS, to satisfy said judgment, attorney fee and costs, the Sheriff will have the above described real estate advertised and sell the same with appraisement according to law and the proceeds derived therefrom be disbursed by the Court Clerk as follows:

1. The payment of costs of said sale and of this action.

2. In payment of said Defendant BANK the sum of $27,849.37, plus interest accrued and interest accruing.

3. The residue, if any, shall be held by the Clerk of this Court to await the further order of the Court concerning the lien of the Oklahoma Tax Commission and other junior lien holders.

IT IS FURTHER ORDERED by the Court that from and after a sale of said real estate as hereinabove directed, the confirmation of said sale by the Court, the parties to this action shall be forever barred and foreclosed of and from any lien upon or adverse to the right and title of the purchaser of said sale; and the remaining Defendants hereto, and all persons claiming by, through or under them since the commencement of this action, are hereby perpetually enjoined and restrained from ever setting up or asserting any lien upon or right, title, equity or interest in or to said real estate adverse to the right and title of the purchaser at such sale, if same be had and confirmed; and that upon proper application by the purchaser, the said Court Clerk shall issue a writ of assistance to the Sheriff of said County, who shall, thereupon and forthwith place the said purchaser in full and complete possession and enjoyment of the premises.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the STATE OF OKLAHOMA, ex rel, OKLAHOMA TAX COMMISSION, have and recover judgment against the Defendants, CHARLES THOMAS BURNS and DIANA BURNS a/k/a DIANA L. BURNS, in accordance with and to the extent of its tax warrants filed of record in the office of the County Clerk, Mayes County, Oklahoma in Book 763 at Page 323 and Book 787 at Page 335.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the tract of real property herein described belonging to Defendants, CHARLES THOMAS BURNS and DIANA BURNS a/k/a DIANA L. BURNS, for which the automatic stay in bankruptcy was modified to

allow foreclosure. All other real properties not specifically described in Paragraph 3 remain subject to the automatic stay and all parties claiming an interest therein retain their interest as existed prior to modification of the automatic stay.

JUDGE

JOURNAL ENTRY OF JUDGMENT - 94-C 1173B

APPROVED AS TO FORM:

GENE HAYNES, OBA #2116
DISTRICT ATTORNEY
Attorney for TREASURER OF MAYES COUNTY
and BOARD OF COUNTY COMMISSIONERS OF
MAYES COUNTY

JOURNAL ENTRY OF JUDGMENT - 94-C 1173B

APPROVED AS TO FORM:

GARY J. DEAN, OBA #2248
Attorney for MAC ARTHUR CO.

JOURNAL ENTRY OF JUDGMENT - 94-C 1173B

APPROVED AS TO FORM:

RANDALL ELLIOTT, OBA #2683
Attorney for DIANA BURNS a/k/a
DIANA L. BURNS

JOURNAL ENTRY OF JUDGMENT - 94-C 1173B

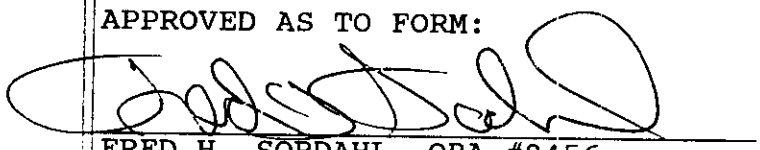
APPROVED AS TO FORM:

Terry P. Malloy

TERRY P. MALLOY, OBA # 5648
Attorney for CHARLES THOMAS BURNS

JOURNAL ENTRY OF JUDGMENT - 94-C 1173B

APPROVED AS TO FORM:



FRED H. SORDAHL, OBA #8456
Attorney for LAKESIDE BANK OF SALINA

JOURNAL ENTRY OF JUDGMENT - 94-C 1173B

APPROVED AS TO FORM:

Douglas R. Haughey

DOUGLAS R. HAUGHEY, OBA #13290
Attorney for Plaintiff

JOURNAL ENTRY OF JUDGMENT -94-C-1173B

APPROVED AS TO FORM:

KIM ASHLEY, OBA #
ATTORNEY FOR OKLAHOMA TAX COMMISSION
American Builders & Contractors Supply Co.
v. Charles T. Burns, 94-C-1173B, Northern District

JOURNAL ENTRY OF JUDGMENT - 94-C 1173B

APPROVED AS TO FORM:

JOSEPH Q. ADAMS, OBA # 137
Trustee for CHARLES THOMAS BURNS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RICK ROUNDS,)
)
Plaintiff,)
)
vs.) No. 95-CV-1076-H
)
BILL MCKENZIE, et al.,)
)
Defendants.)

ORDER

On May 3, 1996, the Court notified Plaintiff that in eleven days it would dismiss this action for failure to serve the defendants as set out in Fed. R. Civ. P. 4(m). Plaintiff has not objected.

Accordingly, this action is hereby DISMISSED without prejudice for lack of service.

SO ORDERED THIS 30TH day of May, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TONYA HART,

Plaintiff,

v.

UNITED STATES of AMERICA, ex rel U.S. DEPARTMENT of LABOR and TULSA JOB CORP.,

Defendants.

Case No. 95-CV-882-H

FILED
MAY 30 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes before the Court on the motion to dismiss of Defendant Management and Training Corporation ("MTC"), improperly sued as Tulsa Job Corp. (Docket # 5) and on the motion to dismiss of Defendant United States of America (Docket # 9). MTC asserts that dismissal is proper pursuant to Fed. R. Civ. P. 12 (b)(6) (failure to state a claim), and the United States moves for dismissal under Fed. R. Civ. P. 12(b)(1) (lack of jurisdiction) and 12(b)(6).

Plaintiff's complaint, filed on September 7, 1995, alleges one claim sounding in negligence against both Defendants. The operative paragraph of the complaint states that "[o]n or about November 28, 1992, in the City of Tulsa, Oklahoma, the Plaintiff sustained personal injuries as a result of the negligence of the Defendant in failing to provide adequate security at the Tulsa Job Corp Center, and as a further result of the unprovoked assault and battery upon the Plaintiff by Defendant's security guard, who was the agent and/or employee of the Defendant and was acting within the scope of his agency and/or employment." Plaintiff prays for damages in the amount of $350,000.00.

In ruling on the motions to dismiss, the Court accepts as true the "well pled facts" of the complaint, to the extent they are uncontroverted by defendants' affidavits. Federal Deposit Ins.

Corp. v. Oaklawn Apartments, 959 F.2d 170, 174 (10th Cir. 1992). If the parties present conflicting affidavits, then the Court must resolve any factual disputes in favor of the plaintiff. Id.

I.

Defendant MTC asserts that dismissal is proper pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671, et seq. Initially, MTC alleges that it is considered a government instrumentality for purposes of the FTCA. As such, the "intentional tort exception" to the FTCA, bars any claim against MTC arising out of an "unprovoked asssault and battery" by a government employee. See 28 U.S.C. § 2680(h) (1994); e.g., Naisbitt v. United States, 611 F.2d 1350, 1356 (10th Cir. 1980).[1]

In response, Plaintiff appears to argue that MTC should be liable for injuries inflicted upon her by "non-government" employees. See Plaintiff's Response to Defendant Management and Training Corporation's Motion to Dismiss Plaintiff's Claims ("Plaintiff's Response') at 2 ("The intentional tort exception of the FTCA does not apply to assaults by non-government employees."). From a review of the complaint, the Court is unable to discern whether Plaintiff is alleging that MTC employed the government security guard who allegedly injured her or whether Plaintiff is alleging that MTC failed to provide adequate security which resulted in injuries from other, unnamed persons who are not government employees. Plaintiff's complaint is unclear in that she refers to a single "Defendant" in the above-cited operative paragraph of the complaint, although she has sued two separate parties.

Regardless of what Plaintiff is actually alleging, MTC is entitled to dismissal. As stated above, if MTC is a governmental instrumentality, then the FTCA bars any claim against it arising out of assault and battery. On the other hand, if MTC is not a governmental entity for purposes of the FTCA (or if Plaintiff's claims against it do not arise out of the actions of a government

[1] The Court declines to accept Plaintiff's argument that the actions of the security guard, although a government employee, do not fall within the intentional tort exception to the FTCA.

employee, the security guard, but rather out of the actions of unspecified third persons), then Plaintiff's claim against MTC must be dismissed because it is barred by the applicable statute of limitations. Plaintiff's claim against MTC sounds in negligence. In Oklahoma, negligence actions are subject to a two-year statute of limitations. Okla. Stat. tit. 12, § 95(3) (Supp. 1996). In the complaint, Plaintiff alleges that she sustained injuries "[o]n or about November 28, 1992". The instant lawsuit was not filed until September 7, 1995. As such, Plaintiff's claim against MTC is untimely under the applicable statute of limitations. Plaintiff has chosen not to respond to this aspect of MTC's argument. See Plaintiff's Response at 7 ("The Defendant claims that if this Court determines that MTC is not a governmental entity, the Plaintiff's claims are barred by the statute of limitations. However, the Defendant has presented no authority nor argument in support of any claim that MTC is not a governmental entity. Therefore, the Plaintiff is unable to respond, and this portion of the Motion to Dismis should be overruled for failure to present argument or authority.").

While the Court is unable to determine, on the present record, whether MTC is a governmental entity and therefore entitled to assert the FTCA or not, or whether Plaintiff alleges merely that MTC is liable as a result of the actions of unspecified non-government employees, the Court hereby holds that, if MTC is a governmental entity, Plaintiff's claim against it is barred by the FTCA. The Court further holds that if MTC is not a governmental entity, then Plaintiff's claim is barred by the statute of limitations. Therefore, whether or not MTC may assert the FTCA, Plaintiff's claim against MTC must be dismissed. MTC's motion to dismiss Plaintiff's claim (Docket # 5) is hereby granted.

II.

In its motion to dismiss, the United States argues that this Court lacks jurisdiction to resolve the instant dispute because Plaintiff has failed to comply with the administrative prerequisites to filing her lawsuit. The applicable statute provides that an [a]ction under this

section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency . . . ." 28 U.S.C. § 2675(b) (1994). "In order to provide adequate notice to the appropriate agency under the FTCA, a plaintiff must specify 'sum certain' damages in his claim submission. Cizek v. United States, 953 F.2d 1232, 1233 (10th Cir. 1992). The purpose of the sum certain requirement is to facilitate settlement and to inform the agency whether [the] claim is for more than $25,000 and the approval of the Attorney General is needed to settle a claim under 28 U.S.C. § 2672. [citation omitted]." Burkins v. United States, 865 F. Supp. 1480, 1491 (D. Colo. 1994).

There is no dispute that the original claim form sent by Plaintiff to the United States Attorney General in error, fails to meet the statutory requirements as it did not set forth a dollar amount for Plaintiff's claim. By letter to Plaintiff's attorney dated March 9, 1994, the Department of Labor acknowledged receipt of the original claim, noted that it did not constitute a valid claim because of its failure to specify a sum certain, requested further information, and stated the person to whom and the address to which the supplemental information was to be sent. On November 28, 1994, the last day of the statutory period in which Plaintiff's claim could be filed, the United States Attorney General received an amended claim form from Plaintiff's attorney. The Department of Labor never received the amended form.

The issue for the Court is whether the receipt of the amended form by the United States Attorney General constituted constructive receipt by the Department of Labor such that Plaintiff's amended claim was timely filed. Neither party has identified any governing Tenth Circuit authority on this equitable issue.

The Court strictly construes the notice requirements established by the FTCA. Cizek v. United States, 953 F.2d 1232, 1233 (10th Cir. 1992). Further, "[t]he burden is on the claimant to provide sufficient information regarding the nature and merits of his claim so far as liability is concerned." Burkins, 865 F. Supp. at 1491. Here, Plaintiff 's attorney filed Plaintiff's amended

claim with the wrong agency (after receiving notice of the correct agency) at the very end of the limitations period. As the Attorney General received the amended claim on the last day of the limitations period, there was virtually no chance that the appropriate agency would receive notice during the proper time period. Under these circumstances, the Court declines to toll the limitations period to deem Plaintiff's claim timely filed. See Lotriionte v. United States, 560 F. Supp. 41 (S.D.N.Y.), aff'd without published op., 742 F.2d 1435 (2d Cir. 1983) (claim is deemed presented on the day it is received by the appropriate agency; "The Court must imply at least a minimal period for transfer of the claim to the appropriate agency. In the present case, since the alleged presentation to the improper agency, was at the very end of the two year period of limitation, allowing time for transfer to the appropriate agency necessarily defeats plaintiff's claim as time barred."). Therefore, the Court grants the motion to dismiss of the United States (Docket # 9).

IT IS SO ORDERED.

This 30TH day of May, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RAE CORPORATION, an Oklahoma corporation,

Plaintiff,

v.

CSI, INC., a Pennsylvania corporation,

Defendant.

Case No. 95-C-116-H

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by July 1, 1996, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 28th day of May, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SOUTH MIAMI GAS CO. and HOLDCOM, INC.,

Plaintiffs,

v.

ARKLA ENERGY RESOURCES,

Defendant.

Case No. 93-C-783-H

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by July 1, 1996, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 29TH day of May, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WAL-MART STORES, INC., Delaware corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 93-CV-1148-H
AA ELECTRIC & PLUMBING, INC., an Oklahoma corporation, UNDERWOOD ENGINEERING, INC., an Oklahoma corporation, and TIMBERLAKE CONSTRUCTION COMPANY, INC., an Oklahoma corporation,	)	
Defendants.	)	

STIPULATION OF DISMISSAL

COMES NOW Timberlake Construction Company, Inc., by and through its attorney of record, William S. Leach, and Wal-Mart Stores, Inc., by and through its attorney of record, Jon B. Comstock, and stipulate that counts three, four and five of Plaintiff's original Complaint may be, and are hereby, dismissed.

Respectfully submitted,

RHODES, HIERONYMUS, JONES, TUCKER & GABLE

By: _____

William S. Leach
Oneok Plaza
100 W. 5th Street, Suite 400
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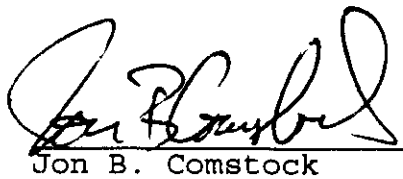
ATTORNEYS FOR DEFENDANT, TIMBERLAKE CONSTRUCTION COMPANY, INC.



Jon B. Comstock
Corporate Litigation Counsel
Wal-Mart Stores, Inc.
P.O. Box 1866
Rogers, Arkansas 72757-1866
(501) 621-2052

ATTORNEY FOR PLAINTIFF

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEO SHADE,

Plaintiff,

vs.

WEXFORD HEALTH SERVICES,

Defendant.

No. 96-CV-71-H

ORDER

This matter comes before the Court on Plaintiff's motion for reconsideration (docket #5).

On April 2, 1996, the Court dismissed this pro se action for lack of prosecution because Plaintiff had failed to submit signed USM-285 forms for service. The Court now grants Plaintiff's motion for reconsideration but concludes this action should be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d).

In this civil rights action, Plaintiff seeks to sue Wexford Health Services and Doctor Johnson for denying him access to a doctor. He alleges he is an alcoholic and drug addict who has been denied the right to see a doctor for his pain for over twenty days. He contends his gums and teeth are hurting and bleeding; he has a knot on his right wrist which is getting larger each day; and his head, arm and back have been hurting. Plaintiff seeks $150,000 in damages for his pain and suffering and an order directing that he be seen by Dr. Johnson.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal

courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's allegations lack an arguable basis in law. The Eighth Amendment prohibits prison officials from being deliberately indifferent to the serious medical needs of prisoners in their custody.[1] Estelle v. Gamble, 429 U.S. 97, 104 (1976). Neither negligence nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause of the Eighth Amendment. See id. at 104-05; Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied,

[1] Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection regarding medical care as that afforded convicted inmates under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990).

450 U.S. 1041 (1981).

Plaintiff alleges no facts to show that his medical conditions are serious and that Defendants acted with deliberate indifference. He acknowledges that he has had bad teeth and cavities most of his life and that he is an alcoholic and drug addict. Moreover, Plaintiff admits that the nurse at the jail gave him Advil and/or Tylenol for pain.

Accordingly, Plaintiff's motion for reconsideration (docket #4) is **granted** but this action is **dismissed** as frivolous pursuant to 28 U.S.C. § 1915(d).

IT IS SO ORDERED this 30TH day of MAY, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACQUELYN SELLS and BRIAN SELLS, individually and as husband and wife

Plaintiffs,

vs.

SIX FLAGS OVER TEXAS, INC.; SIX FLAGS OVER TEXAS FUND, LTD.; and TEXAS FLAGS, LTD.,

Defendant.

No. 96-C-400-E
(CIV-95-871-T)

ORDER

In its May 7, 1996 Order, the District Court for the Western District of Oklahoma case transferred this case to the Northern District of Texas. (Docket No. 55). The case, however, was inadvertently transferred to the Northern District of Oklahoma. As it was filed in the wrong district, the Court transfers the action to the Northern District of Texas where venue properly lay. 28 U.S.C. §1406(a).

ORDERED this 28th day of May, 1996.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
COLLEEN K. IVEY aka Colleen Ivey; ONISHA IVEY; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	Civil Case No. 95 C 1063E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28th day of May, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, COLLEEN K. IVEY aka Colleen Ivey and ONISHA IVEY, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, COLLEEN K. IVEY aka Colleen Ivey, signed a Waiver of Summons on November 29, 1995.

The Court further finds that the Defendant, ONISHA IVEY, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning February 27, 1996, and continuing through April 2, 1996, as more fully appears

from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, ONISHA IVEY, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, ONISHA IVEY. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on November 1, 1995; and that the Defendants, COLLEEN K. IVEY aka

Colleen Ivey and ONISHA IVEY, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, COLLEEN K. IVEY, is one and the same person as Colleen Ivey, and will hereinafter be referred to as "COLLEEN K. IVEY." The Defendants, COLLEEN K. IVEY and ONISHA IVEY, were granted a Divorce in Case No. JFD-84-2865, in Tulsa County, Oklahoma. The Defendants, COLLEEN K. IVEY and ONISHA IVEY, are both single unmarried persons.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Ten (10), in Block One (1), NORTHRIDGE, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on March 23, 1984, the Defendants, ONISHA IVEY and COLLEEN K. IVEY, executed and delivered to FIRST SECURITY MORTGAGE COMPANY, their mortgage note in the amount of $38,656.00, payable in monthly installments, with interest thereon at the rate of Twelve and One-Half percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, ONISHA IVEY and COLLEEN K. IVEY, Husband and Wife, executed and delivered to FIRST SECURITY MORTGAGE COMPANY, a mortgage dated March 23, 1984, covering the above-described property. Said mortgage was recorded on March 27, 1984, in Book 4777, Page 1803, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 31, 1985, FIRST SECURITY MORTGAGE COMPANY, assigned the above-described mortgage note and mortgage to CFS MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on January 22, 1986, in Book 4920, Page 751, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 3, 1990, Commercial Federal Mortgage Corporation f/k/a CFS Mortgage Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on October 16, 1990, in Book 5283, Page 36, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1992, the Defendant, COLLEEN K. IVEY, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on November 1, 1993.

The Court further finds that the Defendants, COLLEEN K. IVEY and ONISHA IVEY, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, COLLEEN K. IVEY and ONISHA IVEY, are indebted to the Plaintiff in the principal sum of $59,144.86, plus interest at the rate of 12.5 percent per annum from April 4, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $141.00, plus penalties and interest, for the year of 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, COLLEEN K. IVEY and ONISHA IVEY, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, COLLEEN K. IVEY and ONISHA IVEY, in the principal sum of $59,144.86, plus interest at the rate of 12.5 percent per annum from April 4, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62% percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in

the amount of $141.00, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COLLEEN K. IVEY, ONISHA IVEY and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, COLLEEN K. IVEY and ONISHA IVEY, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $141.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of

the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95 C 1063E

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARVIN R. WASHINGTON,

Petitioner,

vs.

CLOID SHULER, and ROBERT H. MORALES,

Respondents.

No. 96-CV-382-E

ORDER

On April 22, 1996, the U.S. District Court for the Western District of Texas transferred to this Court Petitioner's motion for leave to proceed in forma pauperis, a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, a "brief in support of habeas corpus," and an "int[r]oduction to brief [in support]." In his petition for a writ of habeas corpus and brief in support, Petitioner challenges his First Degree Murder Conviction in Osage County District Court on the same grounds raised in Case No. 95-CV-1077-C. Accordingly, the Court summarily dismisses the instant habeas action as it is duplicitous.

In his "int[r]oduction to brief [in support]," Petitioner challenges his transfer to a Texas private prison, the denial of medical care, and the denial of access to law material. The Court concludes that these claims should be addressed in the newly opened civil rights action, Case No. 96-CV-319-K. Petitioner could easily include those claims in his original or amended complaint.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is **DISMISSED** as it is identical to Case No. 95-CV-1077-C. The Clerk

shall **FILE** and docket a copy of the "int[r]oduction to brief in support" in Case No. 96-CV-319-K and **MAIL** a copy of the same to Petitioner.

SO ORDERED THIS 28th day of May, 1996.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHNNY PAUL CLARK,

Plaintiff,

vs.

LOGAN COUNTY SHERIFF DEPARTMENT, et al.,

Defendants.

No. 96-CV-453-E

ORDER

Before the court is Plaintiff's pro se motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 and civil rights complaint pursuant to 42 U.S.C. § 1983. Upon review of the complaint, the Court finds that venue is not proper in this district.

The Court may raise sua sponte the issue of venue in the setting of a section 1915 case. See Yellen v. Cooper, 828 F.2d 1471, 1474-76 (10th Cir. 1987) (allowing for dismissal, under 1915(d) on grounds that would be the basis of an affirmative defense); see also Costlow v. Weeks, 790 F.2d 1486, 1487-88 (9th Cir. 1986) (allowing dismissal sua sponte for lack of venue before responsive pleading had been filed; issue had not been waived). The applicable venue provision for this action is found under 28 U.S.C. §1391(b) which provides as follows:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is

situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

There is no applicable law with regard to venue under 42 U.S.C. §1983 which would exempt this case from the general provisions of 28 U.S.C. §1391(b). Coleman v. Crisp, 444 F. Supp. 31 (W.D. Okla. 1977); D'Amico v Treat, 379 F. Supp. 1004 (N.D. Ill. 1974).

Plaintiff bases his Complaint on allegations that his Miranda rights were violated during his arrest in Logan County, that he was not permitted a phone call after his arrest, and that charges should be dismissed. According to the Complaint, the Defendants are residents of Purcell, Oklahoma. The Court takes judicial notice that the Purcell is located within the Western District of Oklahoma. 28 U.S.C. §116. Thus, it is clear that venue is not proper before this Court.

When venue is not proper, the Court may dismiss the action, or if it be in the interest of justice, may transfer the case to the district in which it should have been brought. 28 U.S.C. §1406(a). Because Plaintiff's complaint is handwritten, the undersigned finds that it would be in the best interest of justice and judicial efficiency to transfer the case to the proper district. Accordingly, this matter is **transferred** to the United States District Court for the Western District of Oklahoma.

IT IS SO ORDERED this 28th day of May, 1996.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ROBERT L. MORGAN aka ROBERT LEE MORGAN, SR.; KIMBERLY DAWN ROLAND fka KIMBERLY DAWN MORGAN aka KIMBERLY D. MORGAN; MISSOURI DEPARTMENT OF SOCIAL SERVICES; STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES; COUNTY TREASURER, Rogers County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma,	)	**F I L E D** MAY 29 1996 Phil Lombardi, Clerk U.S. DISTRICT COURT ENTERED ON DOCKET DATE MAY 30 1996
	)	
Defendants.	)	Civil Case No. 95CV 936C

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 29 day of May, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; and the Defendants, ROBERT L. MORGAN aka ROBERT LEE MORGAN, SR., KIMBERLY DAWN ROLAND fka KIMBERLY DAWN MORGAN aka KIMBERLY D. MORGAN, MISSOURI DEPARTMENT OF SOCIAL SERVICES, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, MISSOURI DEPARTMENT OF SOCIAL SERVICES, acknowledged receipt of Summons and Complaint on September 2, 1995, by Certified Mail; that the Defendant, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, acknowledged receipt of Summons and Complaint on November 2, 1995, by Certified Mail; that the Defendant, KIMBERLY DAWN ROLAND fka Kimberly Dawn Morgan aka Kimberly D. Morgan, acknowledged receipt of Summons and Complaint on November 20, 1995, by Certified Mail; that Defendant, COUNTY TREASURER, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on September 20, 1995, by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, acknowledged receipt of Summons and Complaint on September 20, 1995.

The Court further finds that the Defendant, ROBERT L. MORGAN aka Robert Lee Morgan, Sr., was served by publishing notice of this action in the Claremore Daily Progress, a newspaper of general circulation in Rogers County, Oklahoma, once a week for six (6) consecutive weeks beginning March 14, 1996, and continuing through April 18, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, ROBERT L. MORGAN aka Robert Lee Morgan, Sr., and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the

last known address of the Defendant, ROBERT L. MORGAN aka Robert Lee Morgan, Sr. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, filed their Answer on November 7, 1995; and that the Defendants, ROBERT L. MORGAN aka Robert Lee Morgan, Sr., KIMBERLY DAWN ROLAND aka Kimberly Dawn Morgan aka Kimberly D. Morgan, MISSOURI DEPARTMENT OF SOCIAL SERVICES and STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, ROBERT L. MORGAN, is one and the same person as Robert Lee Morgan, Sr., and will hereinafter be referred to as "ROBERT L. MORGAN." The Defendant, KIMBERLY DAWN ROLAND, is one and the same person formerly referred to as Kimberly Dawn Morgan and Kimberly D. Morgan, and will hereinafter be referred to as "KIMBERLY DAWN ROLAND." The Defendants,

ROBERT L. MORGAN and KIMBERLY DAWN ROLAND, were granted a divorce on January 27, 1992, in Rogers County, Oklahoma. The Defendants, ROBERT L. MORGAN and KIMBERLY DAWN ROLAND, have remained single unmarried persons since their divorce.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

> THE NORTH 208 FEET OF THE EAST 165 FEET OF THE W/2 OF THE NW/4 OF THE NW/4 OF THE SE/4 OF SECTION 32, TOWNSHIP 23 NORTH, RANGE 17 EAST OF THE I.B. & M., ROGERS COUNTY, OKLAHOMA, ACCORDING TO THE U.S. GOVERNMENT SURVEY THEREOF.

The Court further finds that on January 30, 1991, the Defendant, ROBERT L. MORGAN, executed and delivered to MAXIM MORTGAGE CORPORATION, his mortgage note in the amount of $33,735.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, ROBERT L. MORGAN and KIMBERLY D. MORGAN, husband and wife, executed and delivered to MAXIM MORTGAGE CORPORATION, a mortgage dated January 30, 1991, covering the above-described property. Said mortgage was recorded on January 30, 1991, in Book 847, Page 646, in the records of Rogers County, Oklahoma.

The Court further finds that on April 22, 1992, MAXIM MORTGAGE CORPORATION, assigned the above-described mortgage note and mortgage to

BANCOKLAHOMA MORTGAGE CORP. This Assignment of Mortgage was recorded on April 29, 1992, in Book 880, Page 524, in the records of Rogers County, Oklahoma.

The Court further finds that on April 27, 1992, BANCOKLAHOMA MORTGAGE CORP., assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT, HIS SUCCESSORS AND ASSIGNS. This Assignment of Mortgage was recorded on April 29, 1992, in Book 880, Page 525, in the records of Rogers County, Oklahoma.

The Court further finds that on April 9, 1992, the Defendant, ROBERT L. MORGAN, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendant, ROBERT L. MORGAN, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, ROBERT L. MORGAN, is indebted to the Plaintiff in the principal sum of $44,865.66, plus interest at the rate of 9.5 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount.

The Court further finds that the Defendants, COUNTY TREASURER, Rogers County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $25.21 which became a lien on the property as of 1992, a lien in the amount of $22.73 which became a lien on the property as of 1993 and a

lien in the amount of $19.92 which became a lien on the property as of 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, ROBERT L. MORGAN, KIMBERLY DAWN ROLAND, MISSOURI DEPARTMENT OF SOCIAL SERVICES and STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, ROBERT L. MORGAN, in the principal sum of $44,865.66, plus interest at the rate of 9.5 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER, Rogers County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, have and recover judgment in the amount of $67.86, plus costs and interest, for personal property taxes for the years 1992 through 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, ROBERT L. MORGAN, KIMBERLY DAWN ROLAND, MISSOURI DEPARTMENT OF SOCIAL SERVICES and STATE OF OKLAHOMA, ex rel. DEPARTMENT OF HUMAN SERVICES, have no right, title or interest in the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, ROBERT L. MORGAN, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendants, COUNTY TREASURER, Rogers County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma, in the

amount of $67.86, personal property taxes which are

currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
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(918) 581-7463

Michele L. Schultz

MICHELE L. SCHULTZ, OBA #13771
Assistant District Attorney
219 S. Missouri, Room 1-111
Claremore, OK 74017
(918) 341-3164
Attorney for Defendant,
County Treasurer and
Board of County Commissioners
Rogers County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95CV 936C

LFR:flv

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsylvania corporation; and SUN COMPANY, INC., a Pennsylvania corporation,

DEFENDANTS.

CASE NO. 94-C-1059-H

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiffs, **Bobby McCaslin and Linda McCaslin,** only and the defendants, **SUN COMPANY, INC. (R&M),** and **SUN COMPANY INC.,** pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

JOHN M. MERRITT - OBA #6146
Merritt & Rooney, Inc.
P.O. Box 60708
Oklahoma City, OK 73146
(405) 236-2222
Attorneys for Plaintiffs

ROBERT P. REDEMANN - OBA #7454
Rhodes, Hieronymus, Jones
Tucker & Gable
2800 Fourth National Bank Bldg.
Tulsa, OK 74119
Attorneys for Defendants

J137-095

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AVTECH, INC., an Oklahoma corporation, and DONALD A. MCCANCE,

Plaintiffs

v.

E. MISHAN & SONS, INC., a New York corporation, CHEERING COUPLE ENTERPRISE, a Taiwan corporation, and HANOVER HOUSE, a Pennsylvania corporation,

Defendants

Civ. Action No. 94 C 105 K

STIPULATION AND ORDER OF DISMISSAL

It is hereby stipulated between the plaintiffs and defendant E. Mishan & Sons, Inc., these parties having reached a private agreement settling their differences, and having acknowledged that plaintiffs' utility patent 5,269,261 and design patent 345,633 are valid, without any acknowledgement of wrongdoing by defendants, the above action be voluntarily dismissed against all defendants, under the provisions of Fed. R. Civ. P. 41(a)(1)(ii), with prejudice, without costs or disbursements.

[CONTINUED FOLLOWING PAGE]

Dated: May 21, 1996

Brian J. Rayment, OBA # 7441
KIVELL, RAYMENT AND FRANCIS
Triad Center, Suite 240
7666 East 61st Street
Tulsa, Oklahoma 74133
(918) 254-0626

&

Mark G. Kachigian, OBA #4852
HEAD, JOHNSON & KACHIGIAN
228 West 17th Place
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(918) 587-2000

Attorneys for Plaintiffs

Dated: May 20, 1996

Angelo Notaro (AN-1306)
NOTARO & MICHALOS P.C.
Empire State Building
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(212) 564-0200

&

Dennis D. Brown (OBA 013662)
Dougherty, Hessin, Beavers & Gilbert
Suite 1110, Williams Center Tower I
One West Third Street
Tulsa, Oklahoma 74103
(918) 592-6970

Attorneys for Defendants
E. Mishan & Sons, Inc. and
Hanover Direct Pennsylvania, Inc.

SO ORDERED:

Tulsa, Oklahoma

Dated: May 23, 1996

U. S. D. J.

J137-095

FILED
MAY 28 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AVTECH, INC., an Oklahoma corporation, and DONALD A. MCCANCE,

Plaintiffs

v.

E. MISHAN & SONS, INC., a New York corporation, CHEERING COUPLE ENTERPRISE, a Taiwan corporation, and HANOVER HOUSE, a Pennsylvania corporation,

Defendants

Civ. Action No. 94 C 105 K

FILED
MAY 27 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAY 29 1996

FILED
MAY 21 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION AND ORDER OF DISMISSAL

It is hereby stipulated between counsel for plaintiffs and counsel for Hanover Direct Pennsylvania, Inc., a/k/a Hanover House, that the above action be voluntarily dismissed under the provisions of Fed. R. Civ. P. 41(a)(1)(ii), with prejudice, without costs or disbursements.

[CONTINUED FOLLOWING PAGE]

Dated: May 21, 1996

Brian J. Rayment, OBA # 7441
KIVELL, RAYMENT AND FRANCIS
Triad Center, Suite 240
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Attorneys for Plaintiffs

Dated: May 20, 1996

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Tulsa, Oklahoma 74103
(918) 592-6970

Attorneys for Defendants
E. Mishan & Sons, Inc. and
Hanover Direct Pennsylvania, Inc.

SO ORDERED:

Tulsa, Oklahoma

Dated: May 23, 1996

U. S. D. J.

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 28 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PAUL NEWHAM,

Plaintiff,

v.

BED CHECK CORPORATION and MARGARET BLAKER. in her official and individual capacities,

Defendants.

Case No. 95-C-492 E

ENTERED ON DOCKET

DATE MAY 29 1996

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, Paul Newham, hereby stipulates with the Defendants, Bed Check Corporation and Margaret Blaker, that this action shall be dismissed with prejudice. Each party is to bear its own costs and attorneys fees.

Respectfully submitted,

Karen L. Long, OBA #5510
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Attorneys for Plaintiff, Paul Newham

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Daniel S. Sullivan
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Best, Sharp, Holden, Sheridan,
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Tulsa, OK 74103

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TRACY MAXWELL,

Plaintiff,

vs.

WORLD PUBLISHING COMPANY and KEN FLEMING,

Defendants.

Case No. 95-C-557-BU

ORDER

This matter comes before the Court upon the motion to dismiss filed by Defendants, World Publishing Company and Ken Fleming, which the Court converted to a motion for summary judgment by minute order dated December 27, 1995. Based upon all of the parties' submissions, the Court makes its determination.

Plaintiff, Tracy Maxwell, commenced this action on June 19, 1995, alleging claims against Defendants, World Publishing Company and Ken Fleming, for sexual discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. ("Title VII"), disability discrimination under the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, et seq., wrongful discharge in violation of Oklahoma's public policy, and negligent infliction of emotional distress under Oklahoma law. In her complaint, Plaintiff alleges that on June 16, 1993, while she was on a break and resting her head on a table in the mailroom of Defendant, World Publishing Company, a co-employee slipped his hand under Plaintiff's blouse and rubbed Plaintiff's breast in a sexually harassing manner. Plaintiff alleges that during the

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reporting of the sexual harassment incident, a representative of Defendant, World Publishing Company, questioned Plaintiff as to why she was resting her head during her break. According to Plaintiff, she responded that she was tired and that her drowsiness might be a side effect of a prescription medication she was taking. Plaintiff claims that the representative demanded that she bring in the side effects of the medication on June 21, 1993. Plaintiff alleges that she was terminated on June 18, 1993 because Defendant, Ken Fleming, stated she could not work if she was taking medication that made her drowsy. Plaintiff complains that she was unlawfully terminated by Defendants for reporting the sexual harassment incident. She alternatively complains that Defendants' stated reason for terminating her -- having a condition which required her to take medication which would cause drowsiness -- constituted a violation of the ADA because Defendants made no efforts to reasonably accommodate her.

In their motion, Defendants contend that they are entitled to summary judgment on Plaintiff's Title VII claim on the basis that Plaintiff failed to commence suit within 90 days of her receipt of the right to sue letter from the Equal Employment Opportunity Commission ("EEOC"). Title VII imposes a 90-day limitation upon prospective plaintiffs. 42 U.S.C. § 2000e-5(f)(1). Defendants assert that Plaintiff received the right to sue letter for the Title VII charge on September 8, 1994, but did not file the instant complaint until June 19, 1995. Similarly, Defendants assert that they are entitled to summary judgment on Plaintiff's ADA claim

because she failed to submit her ADA charge to the EEOC or the Oklahoma Human Rights Commission ("OHRC") within 300 days of her termination from Defendant, World Publishing Company. Under the ADA, a charge of discrimination must be filed with the EEOC or OHRC within 300 days after the alleged unlawful act occurred.[1] Defendants claim that the 300-day period expired on April 20, 1994, but that Plaintiff did not file her ADA charge until July 6, 1994. Defendants maintain that the late filing of the ADA charge does not relate back to the filing of the Title VII charge as it arises under a wholly different statutory scheme and subject matter. Defendants additionally assert that Plaintiff's ADA charge is a nullity as she never verified her ADA charge as required by 42 U.S.C. § 2000e-5(b). Defendants further contend that they are entitled to summary judgment on Plaintiff's wrongful discharge claims under Oklahoma law because Plaintiff failed to exhaust her administrative remedies in accordance with Title VII and the ADA. Finally, Defendants assert that if the Court finds summary judgment is appropriate as to the Title VII and ADA claims, it should dismiss without prejudice the state law claims under 28 U.S.C. § 1367.

Plaintiff, in response, contends that her Title VII claim was timely filed as the Title VII claim was not severable from her ADA claim, which was filed within 90 days of the EEOC's right to sue

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[1]42 U.S.C. § 12117(a) adopts the powers, remedies and procedures of 42 U.S.C. §§ 2000e-4-6, inclusive, and 42 U.S.C. §§ 2000e-8-9. Section 2000e-5(e) requires that a claim be filed within 300 days of the unlawful act in those states, such as Oklahoma, which have statutorily prohibited discrimination.

letter for the ADA charge. Plaintiff contends that her ADA charge arose out of the investigation of her Title VII charge. According to Plaintiff, Defendants made allegations in defense of the Title VII charge which, together with other facts, raised a reasonable inference that Plaintiff may have been terminated for a disability, without any effort to provide reasonable accommodation. Plaintiff contends that the scope of the EEOC's investigation should have included the disability allegations and that her Title VII claim did not have to be filed until her ADA charge was finally determined. Plaintiff maintains that the filing of the ADA charge simply amounted to an amendment to the Title VII charge. Alternatively, Plaintiff contends that equity dictates that the 90-day time limitation for the Title VII charge should have been tolled during the EEOC's determination of the ADA charge. Plaintiff specifically asserts that it was her understanding the Title VII right to sue letter was mistakenly sent since her ADA charge was still under investigation.

In regard to her ADA claim, Plaintiff contends that it was timely because it was an amendment to the Title VII claim and therefore the allegations of the ADA charge related back to the filing of the Title VII claim. Plaintiff also contends that she filed her ADA charge on February 2, 1994, rather than on July 6, 1994. She further maintains that the ADA charge was verified, under penalty of perjury, in accordance with 28 U.S.C. § 1746 on July 6, 1994 and January 10, 1995.

Defendants, in reply, argue that the ADA claim and Title VII

claim are not reasonably related and therefore are severable claims. Defendants assert that the authority cited by Plaintiff in support of her position is distinguishable. In addition, Defendants contend that there are not any facts to justify waiver or estoppel of the 90-day time period for filing her Title VII claim. Defendants also maintain that Plaintiff's contention that the ADA charge is an amended complaint is without merit as the ADA charge was only filed with the EEOC, while the Title VII charge was filed with the EEOC and OHRC. Moreover, Defendants assert the charges were assigned two different numbers. Defendants further argue that the EEOC did not actively mislead Plaintiff in the September 7, 1994 right to sue letter as it clearly stated that it was based upon the Title VII violation. According to Defendants, equitable tolling is not permitted unless there is evidence of active deception on the part of the EEOC. Defendants maintain that Plaintiff's failure to comply with the 90-day time period was simply a unilateral mistake on the part of Plaintiff. In regard to the state law claim for wrongful discharge based upon Title VII, Defendants contend that summary judgment is appropriate as Plaintiff has a full and complete remedy under Title VII. With respect to Plaintiff's ADA claim, Defendants argue that Plaintiff failed to present admissible evidence to establish that her ADA charge was filed within 300 days of her termination.

The Court finds that summary judgment is appropriate as to Plaintiff's sexual discrimination claim under Title VII. The Court agrees with Defendants that the Title VII claim was untimely filed.

Section 2000e-5(f)(1) provides that "a civil action may be brought against the respondent named in the charge" within 90 days after the issuance of a right to sue notice. The 90-day period generally commences on the date that the complainant actually receives the EEOC's right to sue letter. Biester v. Midwest Health Services, Inc., 77 F.3d 1264, 1267 (10th Cir. 1996); Million v. Frank, 47 F.3d 385, 388 n. 5 (10th Cir. 1995). In the instant case, it is undisputed that Plaintiff received the right to sue letter for the Title VII charge on September 8, 1994. Her complaint was not filed until June 19, 1995. Clearly, 90 days had past upon the filing of the complaint.

Although the 90-day limitations period is nonjurisdictional and "subject to waiver, estoppel and equitable tolling," Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982), the Court finds that the instant case does not warrant such relief. The Tenth Circuit has recognized equitable tolling of the Title VII time limitation only if the circumstances "rise to the level of active deception which might invoke the powers of equity to toll the limitations period." Cottrell v. Newspaper Agency Corp., 590 F.2d 836, 838-839 (10th Cir. 1979); see, Scheerer v. Rose State College, 950 F.2d 661, 665 (10th Cir. 1991)(Title VII time limit will be tolled only if there has been active deception of a plaintiff regarding procedural prerequisites). Equitable tolling may be applied where the plaintiff has been "lulled into inaction by her past employer, state or federal agencies, or the courts." Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984). Similarly,

if the plaintiff is actively misled or has in some extraordinary way been prevented from asserting his or her rights, the time limitations will be tolled. Million, 47 F.3d at 389; Wilkerson v. Siegfried Ins. Agency, Inc., 683 F.2d 344, 348 (10th Cir. 1982). While Plaintiff maintains that she believed that the September 8, 1994 letter was a mistake as her ADA charge was still under investigation, there is no evidence that the EEOC actively deceived or lulled Plaintiff into inaction. The EEOC letter specifically referred to the Title VII charge and clearly stated that any claim must be filed within 90 days of the determination.

The Court rejects Plaintiff's arguments that the ADA charge and the Title VII charge were not severable and that the ADA charge was merely an "amended complaint." In support of her severability argument, Plaintiff cites to Gomes v. Avco Corp., 964 F.2d 1330 (2nd Cir. 1992). In that case, the plaintiff filed a complaint with the EEOC alleging national origin discrimination based upon "disparate treatment." In a subsequent court action, the plaintiff sued for relief based upon claims of disparate treatment and disparate impact. The Second Circuit found the district court had jurisdiction over the disparate impact claim, even though it was not presented to the EEOC, as it was reasonably related to the disparate treatment allegations in the EEOC complaint. In determining that it was reasonably related, the Second Circuit did not focus on the "four corners" of the framed charged but took into account the "scope of the EEOC investigation" which could reasonably be expected to grow out of the charge of discrimination.

The Second Circuit concluded that an investigation of the disparate claim would have reasonably flowed from an investigation of the disparate treatment claim.

Unlike the claims in Gomes, the claims in the instant case involve dissimilar allegations of discrimination. The discriminatory allegations in Gomes were premised upon national origin. The allegations in this case, however, are based upon sex and disability. In Pejic v. Hughes Helicopters, Inc., 840 F.2d 667 (9th Cir. 1988), the Ninth Circuit determined that an untimely charge of age discrimination did not relate back to the original, timely charge of national origin because the original charge contained "no hint of age discrimination." Id. at 675. Likewise in Rizzo v. WGN Continental Broadcasting, 601 F.Supp. 132 (N.D. Ill. 1985), the court found that an untimely amendment adding a sex discrimination claim was not related to the original age discrimination claim because the allegations "fail[ed] to allude to any act of WGN from which sexually discriminatory conduct may be inferred." Id. at 135. See, Archuleta v. Colorado Department of Institutions, Division of Youth Services, 936 F.2d 483 (10th Cir. 1991)(claims of sexual harassment and discrimination on basis of pregnancy were not encompassed by an EEOC filing based upon retaliation). In the instant case, the sexual discrimination claim contained no intimation of disability discrimination. The sexual discrimination charge made absolutely no references to disability discrimination. In the Court's view, the disability charge would not have been within the scope of the EEOC's investigation of the

allegations in the Plaintiff's sexual discrimination claim. The Court thus concludes that the Title VII and ADA claims were not reasonably related.

With regard to Plaintiff's argument that the ADA charge was an "amended complaint," the Court finds such argument unavailing. Plaintiff's sexual discrimination charge was filed with the OHRC and was assigned an OHRC #106-94E and EEOC #31B940106. The disability charge, however, was only submitted to the EEOC and was assigned only EEOC #311940588. Further, in her disability charge, Plaintiff distinguished between the two charges by referring to the "already filed" Title VII charge and listing the OHRC and EEOC numbers.

The Court further rejects Plaintiff's argument that equity dictates that the 90-day time period for the Title VII charge should have been tolled during the pendency of the ADA charge. Plaintiff has offered no authority for the argument. The Court is unpersuaded that equitable considerations exist to permit the tolling of the Title VII claim pending the determination of the ADA charge. The Court concludes that the submission of the ADA charge did not effect the running of the 90-day time period for the Title VII claim. Ivey v. Meridian Coca-Cola Bottling Co., 108 F.R.D. 118 (S.D. Miss. 1986). Therefore, because the 90-day time period was not tolled, the Court finds that Defendants are entitled to summary judgment on the Title VII claim.

As to Plaintiff's state law claim for wrongful discharge in violation of public policy, as articulated under Title VII, the

Court finds that summary judgment is appropriate for failure of Plaintiff to commence suit on this claim within 90 days of receipt of the right to letter. The Court notes that Plaintiff did not respond to Defendants' arguments and authorities in regard to this claim. Pursuant to Local Rule 7.1(C), the Court deems this portion of Defendants' motion confessed. Upon review of the matter independently, the Court finds that summary judgment is warranted as Plaintiff failed to comply with the Title VII 90-day requirement. See, Atkinson v. Halliburton Company, 905 P.2d 772 (Okla. 1995)(a plaintiff must first resort to and validly exhaust the statutory administrative procedures and remedies as a condition precedent to the filing of a state law public policy tort claim for handicap discrimination); see also, Brown v. Ford, 905 P.2d 223 (Okla. 1995)(limitations or restrictions from statutory scheme upon which a public policy tort is based are applicable).[2]

As to Plaintiff's ADA claim and state law claim for wrongful discharge for violation of public policy, as articulated by the ADA, the Court finds that Plaintiff has presented sufficient evidence to raise a genuine issue of fact as to whether the ADA charge was submitted to the EEOC within 300 days of Plaintiff's termination. The Court further finds that Plaintiff has submitted sufficient evidence to establish that she verified her ADA charge.

---

[2]Because the Court has found summary judgment appropriate as to the wrongful discharge claim for failure to comply with Title VII requirement of commencing suit within 90 days after receipt of right to sue letter, the Court declines to address Defendants' additional argument, raised in their reply brief, that summary judgment is warranted as Plaintiff has a full and complete remedy under Title VII.

Consequently, the Court finds that summary judgment is not appropriate on the ADA claim and the wrongful discharge claim.

Because summary judgment is not appropriate on the ADA claim, the Court shall not dismiss without prejudice the negligent infliction of emotional distress claim under 28 U.S.C. § 1367.

Based upon the foregoing, Defendants' Motion to Dismiss which the Court converted to a Motion for Summary Judgment by Order dated December 27, 1995 (Docket Entry #8) is **GRANTED in part** and **DENIED in part**.

ENTERED this 28th day of May, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAY 28 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TRACY MAXWELL,

Plaintiff,

vs.

WORLD PUBLISHING COMPANY and KEN FLEMING,

Defendants.

Case No. 95-C-557-BU

ORDER

This matter comes before the Court upon the motion to dismiss filed by Defendants, World Publishing Company and Ken Fleming, which the Court converted to a motion for summary judgment by minute order dated December 27, 1995. Based upon all of the parties' submissions, the Court makes its determination.

Plaintiff, Tracy Maxwell, commenced this action on June 19, 1995, alleging claims against Defendants, World Publishing Company and Ken Fleming, for sexual discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. ("Title VII"), disability discrimination under the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, et seq., wrongful discharge in violation of Oklahoma's public policy, and negligent infliction of emotional distress under Oklahoma law. In her complaint, Plaintiff alleges that on June 16, 1993, while she was on a break and resting her head on a table in the mailroom of Defendant, World Publishing Company, a co-employee slipped his hand under Plaintiff's blouse and rubbed Plaintiff's breast in a sexually harassing manner. Plaintiff alleges that during the

TRANSMISSION REPORT

THIS DOCUMENT WAS CONFIRMED
(REDUCED SAMPLE ABOVE - SEE DETAILS BELOW)

** COUNT **
TOTAL PAGES SCANNED : 10
TOTAL PAGES CONFIRMED : 10

*** SEND ***

No.	REMOTE STATION	START TIME	DURATION	#PAGES	MODE	RESULTS
1	918 599 9317	5-28-96 2:36PM	5'01"	10/ 10		COMPLETED 9600

TOTAL 0:05'01" 10

NOTE:
No. : OPERATION NUMBER 48 : 4800BPS SELECTED EC : ERROR CORRECT G2 : G2 COMMUNICATION
PD : POLLED BY REMOTE SF : STORE & FORWARD RI : RELAY INITIATE RS : RELAY STATION
MB : SEND TO MAILBOX PG : POLLING A REMOTE MP : MULTI-POLLING RM : RECEIVE TO MEMORY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LISA MARY WARREN,

Plaintiff,

vs.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendant.

No. 95-C-1157-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 23 day of May, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

12

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FORREST TOWRY, an individual,)
)
Plaintiff,)
)
vs.) Case No. 95-C-973-BU
)
TRW, INC., an Ohio corporation,)
)
Defendant.)

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 28th day of May, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

In Re:

MAX ALEXANDER HEIDENREICH,

Debtor,

MAX ALEXANDER HEIDENREICH,

Appellant,

vs.

BUILDERS STEEL CO., INC., COMMERCIAL CEILINGS AND DRYWALL, INC., and GAINES PLUMBING AND PIPING, INC.,

Appellee.

Case No. 96-C-089-K

ORDER

By Order dated November 22, 1995, the Bankruptcy Court denied Max Alexander Heidenreich's ("Heidenreich") Motion for Relief from Judgment. Heidenreich appeals the decision of the Bankruptcy Court asserting that the Court improperly denied his request for relief. For the reasons discussed below, the Bankruptcy Court's decision is **AFFIRMED**.

I. STATEMENT OF FACTS & PROCEDURAL HISTORY

By Order and Judgment filed March 26, 1990 (in Case No. 96-C-089), the Bankruptcy Court granted judgment to Builders Steel Co., Inc., against Max Alexander Heidenreich, in the amount of $9,775.68 plus costs and fees. [See Judgment of the

Bankruptcy Court, filed March 26, 1990, and Order of the Bankruptcy Court, filed March 26, 1990.] At a hearing on March 13, 1990, the Bankruptcy Court made several findings with respect to Heidenreich and Brookside Realty, Limited Partnership, as part of the findings of fact and conclusions of law. The Bankruptcy Court noted that Heidenreich decided to develop property in the Brookside area in Tulsa, and in March 1987 formed the Brookside Realty, Limited Partnership "wherein investors through this partnership were acquired for the purposes of developing and purchasing the particular property involved." [See Transcript of Court's Ruling, dated March 13, 1990, filed July 20, 1990, attached as Document No. 3 to Appellant's Brief in Chief at 2A.] The Bankruptcy Court observed that Heidenreich was a general partner in Brookside Realty Limited Partnership. [See Transcript of Court's Ruling, dated March 13, 1990, filed July 20, 1990, attached as Document No. 3 to Appellant's Brief in Chief at 3.] The Bankruptcy Court additionally found that "under all of these circumstances the Court is convinced that these particular entities, more particularly Hycore, Inc., Brookside Realty Limited Partnership, Hycore Commercial Realty, Inc., and Hycore Realty are in fact one and the same of [sic] Mr. Heidenreich for none of the parties involved in this matter could have known who they were doing business with, whether Commercial Realty, Inc., the Brookside Realty Limited Partnership, or Hycore, Inc., under the evidence presented to the Court at this time." [See Transcript of Court's Ruling, dated March 13, 1990, filed July 20, 1990, attached as Document No. 3 to Appellant's Brief in Chief at 5.]

On July 28, 1995, a "Mutual Release" was entered into between Builders Steel Co., Inc., as one of the Plaintiffs, and "Brookside Realty, Ltd. BAC Development Co., Its General Partner, Defendants." The Release is signed, on behalf of Defendants, by Donald E. Herrold, Jack N. Herrold, and an individual designated as "President."[1/] [See Mutual Release, July 28, 1995, attached as Doc. No. 2 to Appellant's Brief in Chief.] The Release provides that:

> WHEREAS, Plaintiffs have sued Defendants in a civil action now pending in the District Court of Tulsa County, Oklahoma . . . , and the claims, cross-claims and counterclaims (collectively the "Claims") that have been and/or might be asserted in the Action by any Plaintiff and any Defendant, or in any other action at law or in equity is the subject of and shall be considered covered by this Mutual Release;
> * * *
> 2. Scope. The scope of this Mutual release is intended to include not only the Plaintiffs and Defendants, expressly, but also by implication, their respective heirs, personal representatives, agents, attorneys, officers, directors, successors and assigns; PROVIDED, no defendant in the Action (who is not named below) shall be released and discharged hereby.
> 3. Release. Plaintiffs and Defendants, jointly and severally, hereby irrevocably remise, release, acquit and forever discharge one another, each respectively, of and from any and all Claims of any kind, character or description. . . .

[See Mutual Release, July 28, 1995, attached as Doc. No. 2 to Appellant's Brief in Chief, emphasis added.]

[1/] This signature is indecipherable.

Heidenreich filed a motion for post-judgment relief in the Bankruptcy Court pursuant to Bankruptcy Procedure Rule 9024 and Fed. R. Civ. P. 60(b). Heidenreich asserted that the judgment should be released because: (1) the Bankruptcy Court found that Heidenreich and Brookside Realty Limited Partnership were one and the same; (2) Brookside Realty, Ltd. executed a "Mutual Release" of all liability; and (3) since Brookside and Heidenreich are "one and the same," a release against Brookside operates as a release against Heidenreich.

By Order dated November 21, 1995, the Bankruptcy Court denied Heidenreich's Motion for Relief from Judgment. [See Order dated November 21, 1995, filed November 22, 1995, attached as Doc. No. 4 to Appellant's Brief in Chief.] At a hearing dated November 7, 1995, the Bankruptcy Court noted that "[i]t is obvious that the intent and purpose of this release is not to release Mr. Heidenreich." [See Transcript of Proceedings, held November 7, 1995, filed January 3, 1996, at 6.] Heidenreich appeals the Order of the Bankruptcy Court.

II. STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. Conclusions of law are reviewed *de novo*. Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988).

A denial by a court of a motion pursuant to Fed. R. Civ. P. 60(b) is reviewed under the abuse of discretion standard. See Dowell v. Board of Education of the Oklahoma City Public Schools, 890 F.2d 1483, 1489 (10th Cir. 1989), rev'd on other grounds 498 U.S. 237 (1991); Thompson v. Housing Auth., 782 F.2d 829, 832 (9th

Cir. 1986), cert. denied, 479 U.S. 829 (1986); Simons v. Gorsuch, 715 F.2d 1248 (7th Cir. 1983).

III. ANALYSIS

Heidenreich initially asserts that he is entitled to relief because, in accordance with Fed. R. Civ. P. 60(b), a party can seek relief from the court from a final judgment when "the judgment is void." See Fed. R. Civ. P. 60(b)(4). However, Heidenreich's argument is that the release which was executed by Brookside Realty, Ltd. also released Heidenreich from the judgment of the Bankruptcy Court. This argument is not an assertion that the initial judgment by the Bankruptcy Court is void.[2/] The Bankruptcy Court's denial of Appellant's Motion for Relief under Fed. R. Civ. P. 60(b)(4) was not an abuse of discretion.

Heidenreich's argument is more appropriately addressed to Fed. R. Civ. P. 60(b)(5) which provides that a court may relieve a party from a final judgment when "the judgment has been satisfied, released, or discharged . . . ." Fed. R. Civ. P. 60 (b)(5). Heidenreich, with very little elaboration, asserts that the Bankruptcy Court erred in refusing to release the judgment against Heidenreich "[s]ince the judgment was against Brookside and Heidenreich as 'alter-egos', a release of Brookside automatically releases any judgment against Heidenreich because its the same judgment." See Appellant's Brief in Chief, Doc. No. 2 at 4.

[2/] See, e.g., 11 C. Wright & A. Miller, Federal Practice and Procedure § 2862, at 326-29 (1995) ("A judgment is not void merely because it is erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.").

With respect to the facts involved in this case, the Bankruptcy Court did note that "under all of these circumstances the Court is convinced that these particular entities . . . Brookside Realty Limited Partnership, Hycore Commercial Realty, Inc., and Hycore Realty are in fact one and the same of [sic] Mr. Heidenreich for none of the parties involved in this matter could have known who they were doing business with, whether Commercial Realty, Inc., the Brookside Realty Limited Partnership, or Hycore, Inc., under the evidence presented to the Court at this time." [See Transcript of Court's Ruling, dated March 13, 1990, filed July 20, 1990, attached as Document No. 3 to Appellant's Brief in Chief at 5.] The record indicates that this finding was limited to the particular facts and circumstances involved. Nothing indicates that the Bankruptcy Court found that, for all purposes, Brookside Realty Limited Partnership and Heidenreich were "one and the same." In fact, the Bankruptcy Court, at the November 7, 1995 hearing on Appellant's Motion for Relief noted its findings "some numbers of years ago, as to the theory of alter ego" of the corporations. [See Transcript of Proceedings on November 7, 1995, filed January 3, 1996, referring to the Bankruptcy Court's 1990 decision and findings, at 6.] However, the Court concluded that the "obvious intent" of the parties to the release was not to release Heidenreich. [See Transcript of Proceedings on November 7, 1995, filed January 3, 1996, at 6.]

The release was signed and executed by "Brookside Realty, Ltd. BAC Development Co., Its General Partner, Defendants." The Bankruptcy Court determined that "under certain circumstances," "Brookside Realty Limited Partnership"

and Heidenreich are the same. The record does not indicate that this entity ("Brookside Realty Limited Partnership") is the same entity as "Brookside Realty, Ltd. BAC Development Co." Consequently, even if the Bankruptcy Court's 1990 finding is interpreted to mean that Brookside Realty Limited Partnership is the same as Heidenreich for all purposes, the release was executed by "Brookside Realty, Ltd. BAC Development Co., Its General Partner," and the record does not establish that this entity is the equivalent of Brookside Realty Limited Partnership.

In addition, the actual language of the "Mutual Release" supports the conclusion of the Bankruptcy Court. The release, in the "scope" section notes, "PROVIDED, no defendant in the Action (who is not named below) shall be released and discharged hereby." The only "defendant" named is "Brookside Realty, Ltd. BAC Development Co., Its General Partner." Heidenreich is not named in the release, and the Bankruptcy Court's conclusion that the "obvious intent" of the release was to release only Brookside Realty is not an abuse of discretion. See also William Skillings & Assoc. v. Cunard Transportation, Ltd., 594 F.2d 1078 (5th Cir. 1979) (district court correctly refused to grant relief pursuant to Fed. R. Civ. P. 60(b)(5) because the "parties" named in the release were not the same "parties" to the judgment).

Accordingly, the decision of the Bankruptcy Court is **AFFIRMED**.

Dated this 24 day of May 1996.

TERRY C. KERN
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAM KIERSEY and KAY ORNDORFF,

Plaintiffs,

v.

Case No. 92-C-345-H

DREW DIAMOND, BOBBY BUSBY, CAROLYN KUSLER, CHARLES JACKSON, and CITY OF TULSA, a municipal corporation,

Defendants.

ORDER

This matter comes before the Court on a Motion for Summary Judgment filed by the City of Tulsa ("City") (Docket #172) and Plaintiffs' Motion for Summary Judgment on the Counterclaims of Defendant Kusler (Docket #181).

Plaintiffs are officers in the City of Tulsa Police Department. They brought this action pursuant to 42 U.S.C. § 1983, alleging that they were subjected to retaliation from their supervisors when they reported alleged wrongdoings at the police department's Youth Ranch. Defendant Kusler counterclaimed, asserting libel, slander, and intentional interference with contract claims against both Plaintiffs. In an Order entered on December 14, 1995, the Court granted summary judgment in favor of the individual defendants in this action. The City and the Plaintiffs then filed these motions for summary judgment

I.

Summary judgment is appropriate where "there is no genuine issue as to any material fact,"

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment."). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict

for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250.

II.

The City asserts that Plaintiffs have failed to establish a basis for municipal liability under Section 1983. The Supreme Court has held that the doctrine of respondeat superior does not apply to Section 1983 claims. Monell v. Department of Social Servs., 436 U.S. 658 (1978). Thus, a municipality is liable under Section 1983 only where the plaintiff establishes that the municipality itself was responsible for the alleged deprivation of constitutional rights.

The Supreme Court has recognized three bases for municipal liability under Section 1983. First, a local government may be liable where the alleged deprivation stems from "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell, 436 U.S. at 690. Second, a municipality may be liable under Section 1983 for a decision by a governmental decisionmaker who "possesses final authority to establish municipal policy with respect to the action ordered." Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986). Finally, a municipality may be liable "for the actions of an employee who is not a final policymaking authority if a widespread practice exists to the end that there is a 'custom or usage with the force of law.'" Sauers v. Salt Lake County, 1 F.3d 1122, 1129 (10th Cir. 1996); see St. Louis v. Praprotnik, 475 U.S. 469 (1986). The sole basis of liability asserted by Plaintiffs is that the allegedly unconstitutional actions were taken pursuant to the orders of a final policymaker for the City, Police Chief Drew

Diamond.

The "final policymaker" determination is a question of state law. Pembaur, 475 U.S. at 483. The Tenth Circuit has recently recognized three elements that assist in determining whether an individual is a final policymaker:

> (1) [W]hether the official is meaningfully constrained "by policies not of that official's own making;" (2) whether the official's decisions are final -- i.e., are they subject to any meaningful review; and (3) whether the policy decision purportedly made by the official is within the realm of the official's grant of authority.

Randle v. City of Aurora, 69 F.3d 441, 448 (10th Cir. 1995). The Court notes that the City Charter provides police officers a right to appeal to the Civil Service Board any adverse employment action taken by the Chief of Police. See Tulsa Rev. Charter, Art. X, §§ 8.1 - 8.4. Further, City ordinances specifically place the Police Department under the "control and authority of the Mayor who shall approve rules and regulations defining the authority, specifying the duties, and governing the conduct of all police officers and employees of the Department." 29 Tulsa Rev. Ordinances, Ch. 1, §101. In fact, the record suggests that the mayor exercised his statutory authority and interceded on behalf of Plaintiffs by ordering the District Attorneys Office to conduct an investigation of their complaints and temporarily transferring Plaintiffs to his office during the course of the investigation. The City ordinances also provide:

> **SECTION 106. POWERS OF CHIEF**
>
> The Chief of Police shall have general supervision of the Department, and shall be accountable to the Mayor for the promulgation of all orders or regulations made or given to the Department. Every member of the Police Department shall respect and obey all orders issued by the Chief. It shall be the duty of the Chief to confer fully with and be advised by the Mayor on all important matters pertaining to the government of the Department.

Id. at § 106. Applying the test enunciated by the Tenth Circuit to the facts of the instant case, the

Court concludes that Chief Diamond was not a final policymaker for the City because City ordinances constrained his authority and his employment decisions were subject to "meaningful review."

Plaintiffs concede that the police chief's authority "may be over-ridden by the Mayor or City Commission." Pls.' Resp. Br. at 5. Relying upon Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989), however, they contend that "a Police Chief, given 'general supervision'[1] over the Police Department (even though his supervision can be overruled by the Mayor) is to be considered the 'final policymaker' under the Monnel [sic] test." Pls.' Resp. Br. at 7. The Court concludes that Flanagan is clearly distinguishable from the instant case. In Flanagan, the police chief issued reprimands to police officers who owned a video store which rented allegedly pornographic videos. The Tenth Circuit held:

> We note at the outset that the City admitted that "[a]t all times pertinent hereto, the City of Colorado Springs has delegated to [Chief Munger] final authority to issue reprimands to Colorado Springs police officers." This admission effectively disposes of the municipal liability issue because it all but flatly states that Chief Munger was the final policymaker with respect to issuing written reprimands in the department.

890 F.2d at 1568. Further, the City of Colorado Springs admitted that "there is no provision for administrative review of written reprimands in the City's procedural manual." Id. at 1569. The Tenth Circuit thus concluded that "for all intents and purposes, the Chief's discipline decisions are final, and any meaningful administrative review is illusory." Id. To the contrary, the Court has determined that Chief Diamond's personnel decisions were subject to meaningful review. Thus, even if Chief Diamond

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[1] Plaintiffs assert that Flanagan "clearly holds" that a police chief's general supervisory powers render him a final policymaker. Pls.' Resp. Br. at 7. The Court notes that while Chief Diamond exercised "general supervision" over the Tulsa Police Department, the police chief in Flanagan had "direct management and supervision over the department." Flanagan v. Munger, 890 F.2d 1557, 1568 (10th Cir. 1989). Therefore, Flanagan clearly does not support Plaintiffs' assertion.

engaged in a course of action that deprived Plaintiffs of their constitutional rights,[2] he was not acting as a final policymaker for the City and the City cannot be held liable under Section 1983 for those actions.

III.

On March 11, 1996, Plaintiffs moved for summary judgment on the counterclaims asserted by Defendant Kusler. Although her response to that motion was due on March 29, 1996, Defendant Kusler has yet to file a response or a request for extension of time to respond. Local Rule 7.1(C) provides as follows:

> Response briefs shall be filed within fifteen days after the filing of the motion. Failure to timely respond will authorize the Court, in its discretion, to deem the matter confessed, and enter the relief requested.

Upon a review of the record and the brief of Plaintiffs, the Court hereby deems the matter confessed and holds that summary judgment in favor of Plaintiffs on Defendant Kusler's counterclaim is appropriate.

Accordingly, the City's Motion for Summary Judgment (Docket #172) is hereby granted, and Plaintiffs' Motion for Summary Judgment on Defendant Kusler's counterclaims is hereby granted (Docket #181).

IT IS SO ORDERED.

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[2]The record indicates that Chief Diamond did not reprimand, suspend, or terminate Plaintiffs. Rather, Plaintiffs base their Section 1983 claim on Chief Diamond's alleged threats and intimidations. Because Chief Diamond was not a final policymaker for the City, the Court need not determine whether Plaintiffs have sufficiently alleged the deprivation of a constitutional right.

This 28TH day of May, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHARLES WILSON and PATRICIA WILSON, as parents and next friends of Brian Wilson, a minor, and Charles and Patricia Wilson, individually,

Plaintiff,

v.

MERRELL DOW PHARMACEUTICALS, INC.,

Defendant.

Case No. 82-CV-710-H

ORDER

This matter comes before the Court on the summary judgment motion of Defendant Merrell Dow Pharmaceuticals Inc. ("Merrell Dow") (Docket # 171). Defendant's motion is premised solely upon the contention that Plaintiffs are unable to produce the requisite evidence of causation, a necessary element of their claims, because their expert testimony is inadmissible under the standard set out by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993) ("Daubert I") and applied by the United States Court of Appeals for the Ninth Circuit on remand in Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir.), cert. denied. 116 S. Ct. 189 (1995) ("Daubert II"). Plaintiffs oppose Defendant's motion, arguing that, under standard established by the Supreme Court, their expert testimony is admissible.

The Court acknowledges that this is not the first time that the Court has considered a motion for summary judgment on this basis; indeed, the complete history of this lawsuit is quite lengthy. The relevant procedural history of the instant case is as follows: prior to Daubert I, the district court denied Merrell Dow's motion for summary judgment on the issue of causation. On October 5, 1990, the Court granted Merrell Dow's motion for an order pursuant to 28 U.S.C. § 1292(b) certifying to the United States Court of Appeals for the Tenth Circuit for an interlocutory

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appeal the question of whether Plaintiffs' evidence on the issue of Bendectin causation in humans is admissible and/or sufficient to create a jury question. The case was stayed pending the Tenth Circuit's determination. On March 10, 1994, the Tenth Circuit remanded the case to the district court for further proceedings in light of Daubert I.[1] On September 28, 1994, after further briefing, the district court denied Merrell Dow's motion for summary judgment, directing the parties to submit a suggested form of question for an interlocutory appeal to the Tenth Circuit on the issue of the admissibility of Plaintiffs' evidence as to causation.[2] The parties failed to comply with the September 28, 1994 order as they never submitted a suggested form of certified question for interlocutory appeal. Subsequently, on November 10, 1994, the case was transferred to another district court judge. On March 7, 1995, the case was transferred again. On November 30, 1995, Plaintiffs advised the Court that the lawsuit had been stayed in error. Pursuant to that

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[1] In an order and judgment, the Tenth Circuit stated:

> [a]fter subsequent briefing and argument of the instant appeal before this court, the Supreme Court of the United States decided Daubert v. Merrell Dow Pharmaceuticals Inc., ___ U.S. ___, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993). The Supreme Court there vacated the Ninth Circuit's affirmance of a summary judgment granted for Merrell Dow Pharmaceuticals Inc., and remanded in a similar case, after addressing the standard for admitting expert scientific testimony in federal trials. Subsequent to the decision of the Court in Daubert, we have received several memoranda from the parties. While they make different comments about Daubert, they are agreed that this cause should be remanded to the district court for further proceedings in light of Daubert. We reach the same conclusion.

Wilson v. Merrell Dow Pharmaceuticals Inc., 20 F.3d 379, 379 (10th Cir. 1994).

[2] The district court's order stated that:

> the Court has reassessed the Defendant's Motion for Summary Judgment in light of Daubert's guidance. The Court is of the opinion that material facts remain in the case and that probative scientific evidence creates a material dispute on the issue of causation; therefore, Defendant's Motion will be DENIED and this Court's March 2, 1990 Order is affirmed. The parties are directed to submit a suggested form of certified question for interlocutory appeal on or before the 21st day of October, 1994. This case will be STAYED pending resolution of this issue by the Circuit.

advice, the Court held a status conference on January 22, 1996 and granted Merrell Dow's request to move for summary judgment again under Daubert II.

I.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250

("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

II.

At a status conference on January 22, 1996, the Court granted Defendant's request to reurge its motion for summary judgment in light of Daubert II, which opinion offers substantial guidance to the Court. Daubert II constitutes the United States Court of Appeals for the Ninth Circuit's application of the standard set forth in Daubert I on remand.

Daubert I and Daubert II involve the same legal issues, the same expert witnesses, and the same facts as the instant case.[3] In both cases, minors (and, in the instant case, the parents as well) sued Merrell Dow, claiming that their limb reduction birth defects were caused by their mothers' ingestion of Bendectin, a drug formerly prescribed in the United States to alleviate morning sickness, when the mothers were pregnant with the minors. Daubert II is thus instructive on the exact issues facing the Court.[4]

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[3] The Court held a hearing on Defendant's motion on May 16, 1996. At the hearing, Plaintiff's attorney conceded that the evidence on this issue in the instant lawsuit is the same as the evidence that was before the Ninth Circuit in Daubert II. Plaintiff's attorney further stated that Plaintiffs oppposed Defendant's motion solely on the basis that this Court should reject the Ninth Circuit's legal application of Daubert I.

[4] At this time, the United States Court of Appeals for the Tenth Circuit has neither commented on Daubert II nor applied Daubert I to a case presenting issues similar to the instant case.

In Daubert I, the Supreme Court determined the appropriate standard for admitting expert scientific testimony in a federal trial. 113 S. Ct. at 2791. Merrell Dow had moved for summary judgment, claiming that plaintiffs would be unable to produce any admissible evidence that Bendectin caused birth defects. The district court granted the motion for summary judgment. The Ninth Circuit affirmed. The Supreme Court granted certiorari "in light of the sharp divisions among the courts regarding the proper standard for the admission of expert testimony." 113 S. Ct. at 2792. The Supreme Court held that Frye v. United States, 293 F. 1013 (D.C. 1923), which established the principle that "expert opinion based on a scientific technique is inadmissible unless the technique is 'generally accepted' as reliable in the relevant scientific community," Daubert I, 113 S. Ct. at 2792, was superseded by the adoption of the Federal Rules of Evidence. Id. Accordingly, the Supreme Court vacated the judgment of the Ninth Circuit and remanded the cases for further proceedings consistent with its opinion.

Under Daubert I, the starting point for a court's analysis as to whether expert testimony is admissible is Rule 702 of the Federal Rules of Evidence. Rule 702 provides that:

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702 contemplates that the trial court will perform some "gatekeeping responsibility" in ensuring that scientific testimony is reliable and relevant. 113 S. Ct. at 2795. In that regard, the Supreme Court outlined a two-pronged approach for determining the admissibility of scientific expert testimony. First, the court should ensure that the testimony pertains to "scientific knowledge". Second, the evidence must be relevant to the legal issue to which the scientific testimony pertains.[5] "The focus, of course, must be solely on principles and methodology, not on

[5] "Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the

the conclusions that [the testimony] generate[s]." Daubert I, 113 S. Ct. at 2797. To assist the trial court in determining the admissibility of the evidence, the Supreme Court articulated four non-exclusive factors: (1) whether the theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) what is the known or potential rate of error; and (4) whether there is general acceptance for the technique in the relevant scientific community. Daubert I, 113 S. Ct. at 2796-97.

The inquiry necessitated by Daubert I contemplates that, in cases involving highly technical or specialized knowledge, the trial court will determine, in the first instance, whether the proposed testimony pertains to "scientific knowledge". See, e.g., Daubert II, 43 F.3d at 1315 ("Federal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post-Daubert world than before."). How to apply the abstract, non-exclusive factors delineated by the Supreme Court is not readily apparent. For this reason, Daubert II aids the Court immensely in meeting this difficult responsibility.

In Daubert II, the Ninth Circuit considered whether the district court's grant of summary judgment on the issue of causation could be sustained under the new standard articulated in Daubert I. 43 F.3d at 1315 ("We will affirm the summary judgment only if, as a matter of law, the proffered evidence would have to be excluded at trial."). The court concluded that, under the new standard, the testimony of Plaintiffs' experts was inadmissible, and thus affirmed the grant of

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testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Daubert I, 113 S. Ct. at 2796.

summary judgment.[6] This decision was appealed to the Supreme Court, which Court refused to grant a writ of certiorari.

In summary form, the two prongs of the Daubert I standard consist of a judicial inquiry into the reliability and the relevancy of the proposed scientific or technical evidence. 43 F.3d at 1315. Under the first prong, the Ninth Circuit inquired as to whether the experts' findings were based upon scientifically valid principles. Id. at 1316. The court interpreted Daubert I as instructing that the court needed more than an expert's own assurance of validity; instead, the court searched for "objective, independent validation". Id. at 1316-17 ("we read the Supreme Court as instructing us to determine whether the analysis undergirding the experts' testimony falls within the range of accepted standards governing how scientists conduct their research and reach their conclusions."). The court first examined whether the opinions offered were based on legitimate, pre-existing research apart from the litigation.[7] After a complete examination of the

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[6] Cf. Wilson v. Merrell Dow Pharmaceuticals Inc., 893 F.2d 1149, 1154 (10th Cir. 1990) (district court's denial of plaintiffs' motion for judgment notwithstanding the verdict upheld, in part, on the basis that "Merrell Dow presented expert testimony, which was not contradicted by the Wilsons' experts, that of the approximately forty epidemiological studies of Bendectin, none has shown a statistically significant association between ingestion of the drug and incidence of birth defects generally or limb defects in particular. This lack of epidemiological proof for the Wilsons' claims is particularly significant in light of recent decisions of federal courts of appeals granting judgment n.o.v. for Merrell Dow based upon the absence of epidemiological evidence showing a causal relationship between Bendectin use and birth defects.").

[7] The court stated:

> [t]hat an expert testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science. [citation omitted]. For one thing, experts whose findings flow from existing research are less likely to have been biased toward a particular conclusion by the promise of remuneration; when an expert prepares reports and findings before being hired as a witness, that record will limit the degree to which he can tailor his testimony to serve a party's interests. Then, too, independent research carries its own indicia of reliability, as it is conducted, so to speak, in the usual course of business and must normally satisfy a variety of standards to attract funding and institutional support. Finally, there is usually a limited number of scientists actively conducting research on the very subject that is germane to a particular case, which provides a natural constraint on parties' ability to shop for experts who will come to the desired conclusion. That the testimony proffered by

experts' affidavits and former testimony, the court concluded that "none of the experts based his testimony on preexisting or independent research." Daubert II, 43 F.3d at 1317.

In light of this conclusion, the court then searched for "other objective, verifiable evidence that the testimony is based on 'scientifically valid principles.'" Id. at 1318. The court stated that "peer review and publication in a generally-recognized scientific journal" is a "significant indication" that the research "meets at least the minimal criteria of good science." Id. None of the plaintiffs' experts had published their work on Bendectin in a scientific journal or solicited formal peer review. The court emphasized that:

> [d]espite the many years the controversy has been brewing, no one in the scientific community -- except defendant's experts -- has deemed these studies worthy of verification, refuation or even comment. It's as if there were a tacit understanding within the scientific community that what's going on here is not science at all, but litigation.

Id.

The court then turned to the testimony of plaintiffs' own experts to attempt to establish the reliability of the testimony itself. "For such a showing to be sufficient, the experts must explain precisely how they went about reaching their conclusions and point to some objective source -- a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like -- to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field." Id. at 1319. The court concluded that Plaintiffs had made no such showing. "[P]laintiffs rely entirely on the experts' unadorned assertions that the methodology they employed comports with standard

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> an expert is based directly on legitimate, preexisting research unrelated to the litigation provides the most persuasive basis for concluding that the opinions he expresses were 'derived by the scientific method.'
>
> Daubert II, 43 F.3d at 1317.

scientific procedures. . . . We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under Daubert, that's not enough." Id. [8]

The Ninth Circuit then examined the record in light of the second prong of the Supreme Court test articulated in Daubert I: whether the testimony offered would assist the trier of fact in determining causation. Id. at 1320. The Ninth Circuit applied California law to plaintiffs' substantive tort claims. California tort law required plaintiffs to show, by a preponderance of the evidence, that Bendectin caused their injuries.[9] Id. The court noted that:

> [i]n terms of statistical proof, this means that plaintiffs must establish not just that their mothers' ingestion of Bendectin increased somewhat the likelihood of birth defects, but that it more than doubled it -- only then can it be said that Bendectin is more likely than not the source of their injury. Because the background rate of limb reduction defects is one per thousand births, plaintiffs must show that among children of mothers who took Bendectin the incidence of such defects was more than two per thousand.

Id. The court found that none of plaintiffs' proffered experts had even claimed that the use of Bendectin more than doubled the risk of birth defects. Id. at 1321 (" . . . the remaining experts proffered by plaintiffs were equally unprepared to testify that Bendectin caused plaintiffs' injuries; they were willing to testify only that Bendectin is 'capable of causing' birth defects."). Therefore,

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[8] The court noted that Dr. Palmer, the only expert willing to testify that Bendectin did indeed cause birth defects in each of the plaintiffs, did not state any understandable scientific basis for his opinion. Daubert II, 43 F.3d at 1319 ("Personal opinion, not science, is testifying here."). Thus, in the absence of any evidence to the contrary, the court had no choice but to conclude that his methodology lacked reliability.

[9] In this respect, Oklahoma tort law is similar to the law of California. See, e.g., Blair v. Eagle-Picher Indus., Inc., 962 F.2d 1492, 1495-96 (10th Cir.) ("Plaintiffs in Oklahoma products liability cases must show that there is a significant probability that the defendant's products caused their injuries. . . . The mere possibility that the product caused the injury is not enough."), cert. denied, 506 U.S. 974 (1992); cf. Jones v. Ortho Pharmaceutical Corp., 209 Cal. Rptr. 456, 460 (Cal. Ct. App. 1985) ("The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case.").

this testimony was inadmissible under the second prong of the analysis set forth in Daubert I.[10] Id. at 1321-22.

III.

In the instant case, Plaintiffs have conceded that the record is virtually identical to the record in Daubert II. Accordingly, Plaintiffs have made no attempt to distinguish the record in this case from the record in Daubert II. Instead, Plaintiffs argue solely that the Ninth Circuit improperly applied Daubert I and that, therefore, when this Court applies Daubert I to the

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[10] In cases where the Tenth Circuit has analyzed an issue relating to the admissibility of expert scientific testimony under Daubert I , the Tenth Circuit's application of the Daubert I analysis is consistent with the Ninth Circuit's reasoning in Daubert II. See, e.g., United States v. Davis, 40 F.3d 1069, 1074-75 (10th Cir. 1994) (district court properly applied Daubert's second prong when it made a preliminary finding regarding admissibility of DNA evidence after hearing testimony regarding scientific procedures that were used in preparing profiles), cert. denied, 115 S. Ct. 1806 (1995); Robinson v. Missouri Pacific R.R. Co., 16 F.3d 1083, 1089 (10th Cir. 1994) ("Concerning future similar issues under Rule 702, we suggest that as 'gatekeeper' the district court carefully and meticulously make an early pretrial evaluation of issues of admissibility, particularly of scientific expert opinions and films or animations illustrative of such opinions."); United States v. Markum, 4 F.3d 891, 895-96 (10th Cir. 1993) ("Under the standard for Rule 702 announced in Daubert v. Merrell Dow Pharmaceuticals, Inc., ___ U.S. ___, 113 S. Ct. 2786, 125 L.Ed.2d 469, the trial court must determine whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. [citation omitted]. Whether the expert testimony will asist the trier of fact goes primarily to relevance. [citation omitted].").

See also, e.g., Wilson v. Petroleum Wholesale, Inc., 904 F. Supp. 1188, 1190 (D. Colo. 1995) (expert witness' opinion as to causation of plaintiff's permanent hearing loss and tinnitus is admissible because it is both reliable and relevant; "[t]his Court's role is only to determine if Dr. Jafek's underlying methodology is grounded in science to a sufficient degree that it has enough reliability and relevance to satisfy the Daubert test."); United States v. Galbreth, 908 F. Supp. 877, 881-95 (D.N.M. 1995) (polygraph evidence admissible under Daubert I because it is based on "scientific knowledge" that "will assist the trier of fact"); Summers v. Missouri Pacific R.R. System, 897 F. Supp. 533, 542 (E.D. Okla. 1995) (expert witness' opinion that plaintiffs suffered from "multiple chemical sensitivity" ("MCS") inadmissible because plaintiffs failed to show, under Daubert I, that theories concerning the causes of MCS had been adequately tested); In re Aluminum Phosphide Antitrust Lit., 893 F. Supp. 1497, 1507 (D. Kan. 1995) (plaintiffs' expert testimony as to causation and amount of damages was economically unreliable and therefore inadmissible under Rule 702); Duffee v. Murray Ohio Mfg. Co., 879 F. Supp. 1078, 1086-87 (D. Kan. 1995) (plaintiff's expert testimony relating to what a reasonable manufacturer could and would have done is inadmissible under Daubert I because it is not supported by appropriate validation; expert "employed none of the recognized methods or 'grounds' for evaluating a reasonable manufacturer's product tradeoff decisions.").

evidence in the instant case, the outcome should be different. The Court has carefully reviewed the standard set forth in Daubert I and the Ninth Circuit's application of that standard in Daubert II. Based upon this review, the Court concludes that the Ninth Circuit properly applied the new standard governing admissibility of scientific expert testimony in federal court.[11]

Therefore, because there is no material question of fact remaining to be determined by a factfinder and Defendant is entitled to judgment as a matter of law, the Court hereby grants Merrell Dow's motion for summary judgment (Docket # 171).

IT IS SO ORDERED.

This 28TH day of May, 1996.

Sven Erik Holmes
United States District Judge

[11] The Court notes that, as stated above, the United States Supreme Court failed to grant certiorari in Daubert II, thus declining to disapprove of the Ninth Circuit's application of Daubert I.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOU ELLA SEYMORE,

Plaintiff,

v.

SHAWVER & SON, INC. and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 584,

Defendants.

Case No. 94-C-95-H

JUDGMENT

This action came on for consideration before the Court, the Honorable Sven Erik Holmes, United States District Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered in favor of Defendant Shawver & Son, Inc.

Further, this Court entered an order on February 7, 1996, granting summary judgment in favor of Defendant International Brotherhood of Electrical Workers, Local Union No. 584.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendants and against Plaintiff.

IT IS SO ORDERED.

This 28TH day of May, 1996.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 24 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEDI, Incorporated,
an Oklahoma corporation

Plaintiff,

vs.

AMEREX FUTURES, INC.,
a New Jersey corporation

Defendant.

Case No. 95-C-1177K

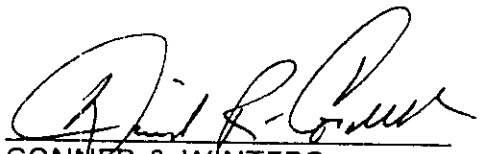
ENTERED ON DOCKET

DATE MAY 28 1996

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, the parties hereto stipulate to the dismissal, with prejudice of their rerspective claims against one another, each party to bear its respective attorneys fees and costs.

DAVID R. CORDELL, OBA #11272



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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 24 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IDELL WARD, et al.,

PLAINTIFFS,

vs.

SUN COMPANY, INC., (R&M), a Pennsylvania corporation; and SUN COMPANY, INC., a Pennsylvania corporation,

DEFENDANTS.

CASE NO. 94-C-1059-H

ENTERED ON DOCKET
DATE MAY 28 1996

PARTIAL STIPULATED DISMISSAL WITHOUT PREJUDICE

COME(S) NOW the Plaintiff, **Rhonda Williams,** only and the defendants, **SUN COMPANY, INC. (R&M),** and **SUN COMPANY INC.,** pursuant to Fed.R.Civ.P. 41(a)(1), and stipulate to the dismissal of all claims of such Plaintiff(s) against such Defendant(s) without prejudice.

The remaining Plaintiff(s) reserve all rights to proceed against the Defendant(s) and any others who may be liable.

Each party to this stipulated dismissal is to bear their own costs.

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM J. PENNINGTON,
442-42-0622

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security Administration,[1/]

Defendant.

No. 93-C-1135-J

ORDER[2/]

Plaintiff, William J. Pennington, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the ALJ erred because the ALJ improperly discredited Plaintiff's

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[1/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

[2/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

[3/] Plaintiff filed an application for disability and supplemental security insurance benefits on June 22, 1992. [R. at 73-76]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Richard J. Kallsnick (hereafter, "ALJ") was held June 8, 1993. [R. at 38]. By order dated August 25, 1993, the ALJ determined that Plaintiff was not disabled. [R. at 13]. The Plaintiff appealed the ALJ's decision to the Appeals Council. On November 29, 1993 the Appeals Council denied Plaintiff's request for review. [R. at 3]. Plaintiff appealed his decision to the District Court. On November 9, 1994, Magistrate Judge Jeffrey Wolfe entered a Report and Recommendation, recommending that the decision of the ALJ be affirmed. [Doc. No. 16-1.] By minute order dated April 18, 1996, the District Court, following a *de novo* review, recommitted the matter for additional consideration by the Magistrate Judge. By Order dated May 8, 1996, the parties consented to proceed before the United States Magistrate Judge in accordance with 28 U.S.C. § 636(c).

testimony. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on July 16, 1943. [R. at 42]. Plaintiff completed high school, and obtained two associate degrees (one in business administration, and one in middle management). [R. at 43].

Plaintiff worked as a telecommunications analyst, but claims he can no longer work due to disability. [R. at 90]. Plaintiff claims that he suffers from ocular migraines which occur approximately four to seven times each week, which can last for several hours, and which cause a loss of vision in his right eye. [R. at 50-52]. (Plaintiff lost all vision in his left eye in 1987.) [R. at 53].

II. STANDARD OF REVIEW

The Secretary has established a five-step process for the evaluation of social security claims.[4/] See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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[4/] Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Secretary has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Secretary's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Secretary is supported by substantial evidence, does not reweigh the evidence or examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will, however, meticulously examine the entire record. Williams, 844 F.2d at 750.

"The finding of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is

more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff was able to perform his past relevant work, and concluded that Plaintiff was not disabled at Step Four. [R. at 24]. The ALJ concluded that Plaintiff does suffer from ocular migraines, but that Plaintiff's activities and testimony were not consistent with a finding of disability. [R. at 21-22].

IV. REVIEW

Kepler and Credibility Determinations

The ALJ determined that Plaintiff's testimony was "not always consistent with the documentary evidence or with itself." [R. at 21]. The ALJ concluded, "after careful evaluation of claimant's signs and symptoms; the nature, duration, frequency, and intensity of the pain; the factors precipitating and aggravating the pain; the dosage, effectiveness, and side effects of the medication taken for relief of pain; the claimant's functional restrictions . . . that the claimant [was] not suffering from a totally disabling pain syndrome. . . ." [R. at]. 22.

Plaintiff asserts that the ALJ inaccurately interpreted Plaintiff's testimony and the record, and improperly evaluated Plaintiff's credibility. Plaintiff argues that the ALJ's conclusion that Plaintiff's testimony was not fully credible is not supported by the record.

In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions. Id. at 390-91.

> Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 391. The Court specifically noted that the ALJ should consider such factors as:

> the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of an relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Id. at 391. The Tenth Circuit remanded the case, requiring the Secretary to make "express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain." Id. at 10.

An ALJ's determination of credibility is given great deference by the reviewing court. See Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). On appeal, the court's role is to verify whether substantial evidence in the record supports the ALJ's decision, and not to substitute the court's judgment for that of the ALJ. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995) ("Credibility determinations are peculiarly within the province of the finder of fact, and we will not

upset such determinations when supported by substantial evidence."); Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992).

The ALJ noted that Plaintiff claims disability because of ocular migraines, which occur approximately four to seven times each week. Plaintiff testified that his headaches cause disorientation and the loss of vision in his right eye. (Plaintiff previously lost his sight in his left eye.) According to Plaintiff, approximately 15-20% of his days are "good days," approximately 20% of his days are bad days, and the remainder of his time consists of "transitional periods." On his good days, Plaintiff is able to run errands, do laundry, or go to the grocery store. [R. at 50]. On his bad days, Plaintiff stated that he generally stays in bed with the drapes closed to keep the light away and he is sensitive to noise. [R. at 50]. Plaintiff's "transitional periods" are the time where he is either recovering from or starting a headache. [R. at 50]. During this time, Plaintiff stated he was sore and was able to fix himself a meal, do laundry, and take care of his dogs, but he "can't function." [R. at 51].

The ALJ analyzed Plaintiff's credibility and determined that

> [t]he claimant's testimony is not always consistent with the documentary evidence or with itself. Dr. Dawson in July 1992, noted the claimant was doing well with his migraine headaches. The claimant, it is noted, lives alone. The claimant says he is allergic to Morphine. The only restrictions placed upon the claimant by his treating or examining physicians, in the past, have been those of operation of machinery, such as cars, and limitations placed upon his ability to travel. The claimant describes his daily activities as performing household chores, visiting with relatives, fishing, listening to music, and watching some television. In the claimant's disability supplemental interview . . . , the claimant said he slept 8 to 10 hours a

> night. The claimant said he had some problem sleeping because of a hiatal hernia. The claimant is noted to live in a house by himself. The claimant says he takes care of his own personal needs and grooming. The claimant does his own cooking, his own laundry, and his own housecleaning. The claimant also does all of his own shopping. The claimant says he shops for anything he needs. The claimant shops at least once a week and it takes approximately 2 hours. The claimant still has a driver's license and drives. The claimant also does his own yard work and works in a garden. In June 1991, the claimant went on a camping trip.
>
> The claimant's daily activities act to contradict his statements that he suffers from significant disabling and debilitating pain. They also tend to contradict the claimant's statements that he is significantly functionally restricted following his episodes of chronic pain. . . . The claimant is suffering from no loss of muscle mass or signs of atrophy. Clearly the claimant is exercising all of his muscles sufficiently to keep them maintained and toned. The claimant is not lying in bed recuperating from migraine headaches as often as he alleges. The evidence indicates that the claimant's migraine headaches, and his pain in general, is adequately controlled with his current pain relief regimen.
>
> The medical records also indicative [sic] that there is some change in the claimant's statements between doctors. . .

[R. at 21-22].

Plaintiff objects to the ALJ's credibility finding. Plaintiff initially asserts that the record does not contain a July 1992 report from Dr. Dawson that Plaintiff is "doing well" with his headaches. Plaintiff is correct that the July 22, 1992 report referred to Plaintiff's hiatal hernia. The entry for this date does note that "[h]e is feeling much better." [R. at 149]. In addition, as noted by Plaintiff in his brief, on May 29, 1990,

Plaintiff's doctor recorded that Plaintiff was still having approximately one headache a day, "but considers them to be much better." [R. at 158].

Plaintiff additionally asserts that the ALJ improperly concluded that Plaintiff was not disabled because of his "activities." Plaintiff notes that Plaintiff never testified that he was always confined to bed and unable to do anything, but that he claimed only 20% of his days were "bad days." Initially, this is only one of the factors noted by the ALJ in his assessment of Plaintiff's credibility. Regardless, although evidence that a claimant engages in limited activities may not establish that the claimant can work, such evidence may be considered, along with other relevant evidence, in considering whether or not the claimant is entitled to benefits. Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988).

Plaintiff also suggests that the ALJ improperly evaluated Plaintiff's testimony that he went fishing. According to Plaintiff, although he previously fished (on a frequent basis), he is currently "afraid to go anywhere by myself." [R. at 59]. However, as pointed out by Plaintiff in his brief, Plaintiff acknowledges that he fishes "occasionally," or approximately once every other month. [R. at 113]. With respect to Plaintiff's fishing, the ALJ noted that fishing could be hazardous if an individual suffered from the onset of sudden and unpredictable blindness four to seven times each week. [R. at 22].

Plaintiff challenges whether the record supports all of the ALJ's conclusions with respect to Plaintiff's credibility. However, even if the factors outlined by the Plaintiff were disregarded, the ALJ's credibility analysis still contains sufficient

support from the record. In addition to the factors challenged by Plaintiff, the ALJ additionally noted that the restrictions from Plaintiff's treating physicians were related to the operation of machinery and to travel, that Plaintiff lived alone and was able to care for himself, that Plaintiff was able to sleep eight to ten hours per night, and that Plaintiff was able to shop, cook, do laundry, drive, and work in the garden. As noted above, the Court, on review, should not disturb the ALJ's credibility findings if the findings are supported by substantial evidence. In this case, based on the record, the Court concludes that it should not disturb the ALJ's findings.[5/]

Accordingly, the Secretary's decision is **AFFIRMED.**

Dated this 24 day of May 1996.

Sam A. Joyner
United States Magistrate Judge

5/ Appellee also points out that the record does not contain much "objective evidence" to support Plaintiff's claim of an impairment. Plaintiff's treating physician's notes indicate that a CT scan was "negative." [R. at 159]. Plaintiff was admitted for epigastric and chest pain on June 30, 1991, and diagnosed with Barrett's esophagus. Plaintiff's records for admissions related to treatment indicate no mention of ocular migraines. [R. at 124-145]. An examination conducted in December 1992 mentions headaches or migraines but with no elaboration. [R. at 173].

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RADHA R. M. NARUMANCHI; and
RADHA B. D. NARUMANCHI,

Plaintiffs,

v.

KINARK CORPORATION, a Delaware corporation; PAUL CHASTAIN, individually; JOHN Q. HAMMONS, individually; JAMES M. REED, individually; HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, an Oklahoma professional corporation,

Defendants.

No. 95-C-220-K

EOD 5/28/96

REPORT AND RECOMMENDATION[1/]

Now before the Court is "[Defendants'] Joint Application for Injunction." [Doc No. 98]. Defendants have also filed a supplement to this motion. [Doc. No. 100]. Plaintiffs have filed no written response. On May 23, 1996, the Court heard argument on this motion. Plaintiff, Radha Ramana Murty Narumanchi, appeared by telephone. Due to illness, Plaintiff, Radha B.D. Narumanchi, was excused from attending the hearing. James Reed, with the law firm Hall, Estill, Hardwick, Gable & Nelson ("Hall Estill"), appeared on behalf of all Defendants.

[1/] At the Status Conference held February 15, 1996, Plaintiffs agreed to fully consent to the jurisdiction of a magistrate judge with regard to all remaining aspects of this case. Plaintiffs are husband and wife. To date, only the husband has signed the consent form. The wife is currently in poor health in India. Efforts are being made to deliver the consent to her for signature. Therefore, a consent by all parties has not been entered pursuant 28 U.S.C. § 636(c). Consequently, the undersigned Magistrate submits this Report and Recommendation rather than entering an Order.

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Defendants move to enjoin Plaintiffs from proceeding further with a substantially similar action filed in the United States District Court for the Central District of Illinois ("the Illinois action"). The undersigned Magistrate Judge hereby offers the following Report and recommends that Defendants' motion be **GRANTED** and that Plaintiffs be enjoined from proceeding further with the Illinois action.

I. INTRODUCTION

A. Factual Background

Plaintiffs were shareholders of Lata Enterprises, Ltd. Defendant, Kinark Corporation ("Kinark"), owned and operated the Camelot Hotel ("the Camelot") in Tulsa, Oklahoma. In March 1991, Lata purchased the Camelot from Kinark. Kinark financed a portion of the purchase price by accepting from Lata a $950,000.00 promissory note and a mortgage. During this original purchase transaction the principals of Lata dealt primarily with Defendant, Paul Chastain -- CEO of Kinark.

Shortly after Lata's purchase of the Camelot, Lata began experiencing cash flow problems. Accordingly, Lata began looking for a financially strong, outside party to either become a partner with Lata or assume Lata's obligations to Kinark. Lata retained Bauer & Associates ("Bauer") to locate a prospective investor. Bauer located Defendant, John Q. Hammons, and introduced him to Lata's principals as a prospective purchaser of the Camelot. Lata apparently related to Kinark all the details of its negotiations with Mr. Hammons. However, during Lata's negotiations with Mr. Hammons, Kinark began a foreclosure action against Lata for failure to make payments on the original note from Lata to Kinark.

Defendant, James M. Reed, is the Hall Estill partner with whom Lata primarily dealt on the Camelot transaction. After the original sale to Lata was complete, Hall Estill continued to represent Kinark. During Lata's negotiations with Mr. Hammons, Lata related the details of that negotiation to Hall Estill, apparently on Kinark's behalf. Hall Estill is also the firm that filed the foreclosure action against Lata on behalf of Kinark.

After negotiations had proceeded smoothly with Mr. Hammons for some time, Plaintiffs allege that Mr. Hammons abruptly stopped communicating with Lata. Eventually, Mr. Hammons purchased Lata's note and mortgage from Kinark and substituted himself as the named plaintiff in Kinark's foreclosure action. It is Mr. Hammons' unexpected flip flop that forms the basis of Plaintiffs' current lawsuit. Plaintiffs allege that all of the Defendants, including Mr. Hammons, were part of a conspiracy from the beginning to defraud Lata and cause it to lose valuable property rights.

B. Litigation Background

In this action, Plaintiffs have pled their claims in two Counts. Count I is a shareholder derivative action on behalf of Lata Enterprises, Ltd. Count II is a claim for "special" damages incurred by Plaintiffs as individuals. Both Counts rely on the following alleged wrongful conduct by Defendants: (1) various species of fraud, including mail and wire fraud as predicate acts supporting a RICO claim; (2) tortious interference with contractual relations; (3) tortious interference with prospective economic advantage; (4) breach of fiduciary duty; (5) civil conspiracy; and (6)

depriving Lata of valuable property rights. Judge Terry Kern has previously dismissed Count I in its entirety. With regard to Count II, Judge Kern has dismissed Plaintiffs' RICO allegations. See Doc. No. 61.

Plaintiffs have also filed a lawsuit in the United States District Court for the Central District of Illinois.[2/] The Court has reviewed the First Amended Complaint filed in this case[3/] and the Complaint filed in the Illinois action. Both the Illinois and Oklahoma complaints arise out of the same set of operative facts. Both complaints name the same defendants, with the exception of Lata, and both complaints contain substantially similar allegations of wrongdoing by the Defendants. In fact, in the Illinois Complaint, Plaintiffs state that the Oklahoma Complaint was brought on "substantially similar grounds and for the same causes of action [as the Illinois Complaint]." See Complaint filed in Illinois action, ¶ 46. From the face of the complaints, this action and the Illinois action are virtually identical.

It also appears from the record that the same type of issues/claims in this action and the Illinois action were also alleged by Plaintiffs as counterclaims and cross claims in a Tulsa County, Oklahoma foreclosure action. These counterclaims and cross claims were stricken by the Tulsa County Court.

[2/] Case Number 96-1085. This case was filed approximately two months after Judge Kern's Order, dismissing Count I and the RICO claims in Count II of this action.

[3/] Doc. No. 50.

II. INJUNCTION

The United State Court of Appeals for the Tenth Circuit has announced the following general rule:

> [T]he first federal district court which obtains jurisdiction of parties and issues should have priority and the second court should decline consideration of the action until the proceedings before the first court are terminated. The simultaneous prosecution in two different courts of cases relating to the same parties and issues 'leads to the wastefulness of time, energy and money.'

Cessna Aircraft Company v. Brown, 348 F.2d 689, 692 (10th Cir. 1965). This rule is often referred to as the "first-filed rule." Thus, pursuant to the first-filed rule, the Illinois action should not proceed if the parties and issues in the Illinois action are substantially similar to the parties and issues in this action.

Pursuant to the "first-filed rule" and the All Writs Act,[4/] the Tenth Circuit has authorized the issuance of an injunction to prevent the following: (1) a misuse of litigation which is vexatious and oppressive, or (2) relitigation of issues which have already been decided between the same parties. See O'Hare International Bank v. Lambert, 459 F.2d 328, 331 (10th Cir. 1972); TGB, Inc. v. Bendis, 36 F.3d 916, 925-26 (10th Cir. 1994); Tripati v. Beaman, 878 F.2d 351, 352-53 (10th Cir. 1989). See also Farmers Bank v. Kittay, 988 F.2d 498, 500 (4th Cir. 1993); Marquest

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[4/] The All Writs Act provides as follows:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a).

Medical Products, Inc. v. McKinnon, 864 F.Supp. 154, 156-58 (D. Co. 1993); Terra International, Inc. v. Mississippi Chemical Corp., 896 F.Supp. 1468, 1473-76 (N.D. Iowa 1995). The Court finds that the circumstances of this case warrant the issuance of an injunction.

As discussed above, the complaints in both this and the Illinois action are virtually identical. Allowing two actions to proceed would be a waste of the parties' resources and a waste of judicial resources. Furthermore, this Court has already issued dispositive rulings with regard to certain of the claims presented by the First Amended Complaint in this action. Plaintiffs are not entitled to relitigate these issues in another district. Allowing Plaintiffs to do so would create the possibility that Defendants would be subject to inconsistent and/or contradictory rulings from two district courts. In short, Plaintiffs have presented nothing which would justify the excessive cost of litigating in two places what is essentially the same matter.

There is also nothing to indicate that the issues presented by the Illinois action cannot be resolved in this case. At oral argument on this motion, Plaintiffs argued that they filed the Illinois action because they believed that this Court should have applied Illinois law to the shareholder derivative action pled in Count I of this action. Plaintiffs argue that had the Court applied Illinois law, it would not have dismissed Count I. This is not a sufficient ground upon which to try and avoid this Court's jurisdiction. If Plaintiffs believe that the Court improperly dismissed Count I, they may file an appeal. They may not run to another district court in an attempt to obtain a different result. If Plaintiffs believe that they have a cause of action based on Illinois

law, then they should present that to this Court *via* the appropriate procedural device. The appropriate procedural device is not to file an action in another district in the hopes of obtaining a different outcome.

As described in the litigation history, *supra*, the Central District of Illinois is the third Court to be presented with claims that relate to Lata's purchase of and the subsequent foreclosure of the Camelot Hotel. Plaintiffs first filed counterclaims in an Oklahoma state court, which were dismissed. Plaintiffs then filed an action in this Court and certain claims were dismissed by this Court. Plaintiffs then filed an action in the Central District of Illinois. This vexatious misuse of litigation also supports the issuance of an injunction in this case.

The Court also notes that the allegations underlying both this action and the Illinois action relate to activities occurring and property located within this district. Two of the three individual defendants reside in this district. Both of the corporate defendants do business in this district and one is an Oklahoma corporation. Furthermore, the Camelot Hotel itself, the centerpiece of this litigation, is located in this district. There are no contacts with the central district of Illinois, other than the fact that Lata, which is now defunct, was once an Illinois corporation. The Court finds that the equities favor the action in this Court (i.e., the first-filed action) going forward without the Defendants having to defend a second, intimately related action in Illinois.

The undersigned does, therefore, recommend that Plaintiffs be enjoined from proceeding further with case number 96-1085, filed in United States District Court for the Central District of Illinois and styled Radha Bhavatarini Devi Narumanchi, et al. v. Kinark Corporation, et al. Plaintiffs are not required to dismiss the Illinois action at this time. At the conclusion of the case filed in this district, if Plaintiffs feel that issues remain in the Illinois action which were not resolved and/or barred by the proceedings in this case, they are free to resume prosecution of the Illinois action.

At oral argument, Plaintiffs argued that if an injunction were issued, an injunction bond would be required pursuant to Fed. R. Civ. P. 65(c). Plaintiffs are not correct. Rule 65(c) only requires an injunction bond when a preliminary injunction is issued. Preliminary injunctions are issued to preserve the status quo until such time as the Court can have a full hearing on the matter and issue a permanent/final injunction. The undersigned has held a full hearing on the issue of whether an injunction is required in this case. Plaintiffs were given notice and they were provided an opportunity to present whatever argument and/or evidence they desired. Therefore, the injunction which the undersigned recommends be entered is not a preliminary injunction. Rather, it is a permanent/final injunction. Rule 65 imposes no bond requirements in connection with a permanent/final injunction.

IT IS SO ORDERED.

Dated this 24 day of May 1996.

Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM J. PENNINGTON,
442-42-0622

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security Administration,[1/]

Defendant.

No. 93-C-1135-J

JUDGMENT

This action has come before the Court for consideration and an Order affirming the decision of the Commissioner has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 24 day of May 1996.

Sam A. Joyner
United States Magistrate Judge

[1/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. Civ. P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. The Court has substituted the Commissioner for the Secretary in the caption.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TONY E. VEYTIA,

Plaintiff,

v.

PANCHO'S MEXICAN BUFFET, INC.,

Defendant.

Case No. 95-C-574-B

O R D E R

Before the Court for consideration is Defendant, Pancho's Mexican Buffet, Inc.'s ("Pancho's"), Motion for Summary Judgment and Supporting Brief, pursuant to Fed. R. Civ. P. 56 (Docket #9), relative to the claims of Plaintiff, Tony E. Veytia, for Defendant's alleged violations of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. Following a thorough review of the record and the applicable legal authority, the Court concludes the Defendant's motion should be GRANTED.

I. Undisputed Facts[1]

1. Pancho's, headquartered in Fort Worth, Texas, operates a chain of cafeteria-style Mexican restaurants in several states in the Southwest. Each of the restaurants is managed by a staff of either two or three levels of local managers, depending on the store's size. These levels include an Assistant Manager, Associate

[1] Plaintiff Veytia wholly failed to follow the strictures of Local Rule 56.1 by failing to begin his Response Brief with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists.

Manager, and Manager. The Manager reports directly to a District Supervisor, who oversees several stores, in a specified geographic area. (Exhibit "C" to Pancho's Motion for Summary Judgment and Supporting Brief ("Defendant's Brief"), at ¶ 2).

2. Plaintiff Tony Veytia commenced employment with Pancho's in December, 1981. (Exhibit "C" to Defendant's Brief at ¶ 3; Exhibit "D" to Defendant's Brief at ¶ 2).

3. Plaintiff filed charges of discrimination with the Texas Commission on Human Rights ("TCHR") on October 4, 1991. (Exhibit "C-1" to Defendant's Brief).

4. Plaintiff's October 4, 1991, TCHR charge of national origin and age discrimination did not purport to invoke the not-yet-effective ADA. (Exhibit "C" to Defendant's Brief at ¶ 9; Exhibit "C-1" to Defendant's Brief).

5. In July, 1992, the parties reached a no-fault settlement agreement of the charge of discrimination with the TCHR. (Exhibit "A" to Defendant's Brief at p. 44).[2]

6. Plaintiff began managing the North Tulsa store on or about August 1, 1992, and reported directly to Oklahoma District Supervisor (now Vice President of Operations) Gary Bessent. Veytia was managing Pancho's Tulsa restaurant at the time of his termination on or about April 25, 1993. (Exhibit "C" to Defendant's Brief at ¶ 3).

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[2] Plaintiff's Response to Defendant's Motion for Summary Judgment states there was a dispute as to the settlement agreement but fails to state the nature of the dispute.

7. Defendant's evidence establishes that upon beginning his employment in Tulsa, several performance problems began to surface and that his conduct violated Pancho's Standards of Conduct. (Exhibit "C" to Defendant's Brief at ¶ 5; Exhibit "C-4"). Defendant's evidence also establishes that from the outset, Plaintiff did not follow instructions from his supervisor and was rude to customers. (Exhibit "D" to Defendant's Brief at ¶ 3; Exhibit "C" to Defendant's Brief at ¶ 9). In his Response Brief, Plaintiff does not admit or deny this statement in accordance with Local Rule 56.1 but merely states there is a jury question because the Defendant refused to make David Dixon or Gary Bessent available for deposition.[3]

8. Plaintiff's personnel file has numerous warnings concerning his performance. The reprimands gave Plaintiff notice of his problems and provided goals. Plaintiff signed several of these documents which included a warning regarding failure to follow company policy regarding hiring new employees and several evaluations noting Plaintiff's deficiencies. (Exhibit "C-3" to Defendant's Brief; Exhibit "A" to Defendant's Brief at pp. 74-75; Exhibit "B" to Defendant's Brief at p. 30; Exhibit "B-1" to Defendant's Brief).[4]

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[3] However, discovery cutoff was March 29, 1996, and Plaintiff has not filed a motion for extension of that cutoff or motion to compel in that regard.

[4] Plaintiff alleges that he never received a copy of the personnel file. There is no motion to compel on file which suggests that Plaintiff requested the personnel file but was unable to obtain it from Defendant's counsel.

9. Defendant's evidence establishes that during his employment at the Tulsa location, Plaintiff required employees to work off the clock, made racial and sexual comments, took food home, slept on the job, falsified safety meeting rosters, received numerous negative customer comment cards, treated employees abusively, and lacked knowledge regarding his position. (Exhibit "C-7" of Defendant's Brief). In his Response Brief, Plaintiff does not admit or deny this statement in accordance with Local Rule 56.1 but merely states he was unable to depose Defendant's witnesses.[5]

10. Plaintiff stated in his deposition that he ordered employees not to submit negative customer comments to Pancho's corporate office, perhaps slept on the job, and misrepresented to management that certain safety meetings were held when they were not. (Exhibit "A" to Defendant's Brief at pp. 83-84, 116-17, and 130-33).[6]

11. Plaintiff received some verbal warnings from Gary Bessent regarding his performance. (Exhibit "A" to Defendant's Brief at pp. 49-51).

12. During Plaintiff's tenure at the Tulsa location from August 1, 1992, until April, 1993, the costs and profit performance for that store declined. After Plaintiff's termination, the

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[5] Plaintiff alleges the affidavits of employees were falsified by the employees in order to keep their employment. However, Plaintiff offers no evidence in support of this contention.

[6] Defendant's evidence in this regard is based on Plaintiff's own testimony, not the testimony of Gary Bessent or David Dixon.

store's performance markedly improved. (Exhibit "C" to Defendant's Brief at ¶ 6; Exhibit "C-5" to Defendant's Brief.)

13. Plaintiff received several warnings about his performance and was given multiple opportunities to improve his conduct. (Exhibit "C" to Defendant's Brief at ¶¶ 7-8; Exhibit "D" to Defendant's Brief at ¶¶ 3-7).[7]

14. Gary Bessent terminated Plaintiff's employment at a meeting on or about April 25, 1993. (Exhibit "C" to Defendant's Brief at ¶ 8; Exhibit "D" to Defendant's Brief at ¶ 6).

15. President and Chief Executive Officer of Pancho's, Hollis Taylor, testified that Plaintiff was given more opportunities to succeed than other managers. (Exhibit "E" to Defendant's Brief at ¶ 3).

15. Plaintiff "had a feeling" he was being fired for post-settlement complaints about the agreement. (Exhibit "A" to Defendant's Brief at pp. 44-45).

II. The Standard of Fed.R.Civ.P. 56 Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

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[7] Defendant denies these allegations but offers no evidence in support of his denial.

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .
>
> "A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a

full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521."

III. Legal Analysis

A. No Predicate Charge of Discrimination Under the ADA[8]

Plaintiff filed his charges of discrimination with the Texas Human Rights Commission on October 4, 1991. The Americans With Disabilities Act did not come into effect until July 26, 1992. Courts have overwhelming held that the ADA was not intended to be given retroactive effect. Garcia-Paz v. Swift Textiles, Inc., 873 F. Supp. 547, 557 (10th Cir. 1995).

Plaintiff would try to persuade this Court that since he was not fired until April 25, 1993 (after the ADA went into effect), his termination fell within the protection of the ADA. Plaintiff alleges he was retaliatorily discharged for filing discrimination charges based on his disability in violation of the ADA. However, the discrimination charges were based on Title VII, ADEA, and the TCHRA.

Under the ADA, it is unlawful for an individual to be retaliated against for opposing "any act or practice made unlawful by this chapter or because such individual made a charge . . . under this chapter." 42 U.S.C. ¶ 12203(a). As stated above, Plaintiff never filed a charge under the ADA. Accordingly, even if Defendant did retaliate against Plaintiff for filing discrimination

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[8] Plaintiff alleges retaliation only under the ADA. Accordingly, the Court will consider Plaintiff's claim only in that regard.

charges, the filing of these charges was not protected by the ADA because they were not filed under the ADA. Learned v. City of Bellevue, 860 F.2d 928, 932 (9th Cir. 1983), is a Title VII case which held there must be discrimination under the Act. Assuming, *arguendo*, Plaintiff was retaliatorily discharged for filing discrimination charges, since the ADA was not in effect at the time the charges were filed, Plaintiff could not possibly be protected by the ADA.

The plaintiff in Marx v. Schnuck Markets, Inc., 76 F.3d 324 (10th Cir. 1996), conceded his discharge stemmed from his conduct under the FLSA, not the ADEA. As a result, the Court held he could not claim retaliation as a result of the ADEA charge. This case is analogous to the present case. The charges of discrimination filed in 1991 clearly show the Plaintiff did not claim any protection under the ADA. Accordingly, the Plaintiff cannot now claim his activity fell within the ADA's protection. Summary judgment is hereby GRANTED regarding Defendant's allegation that Plaintiff's claim does not fall within the ADA's protection.

B. Total Disability Under the ADA

Defendant contends that since Plaintiff admitted he is now totally disabled, he should be barred from bringing this claim. Although Plaintiff failed to respond to this point, the Court finds it to be moot. The disability Plaintiff claims is at issue occurred in 1990. Plaintiff's presently alleged disability is separate from the 1990 disability. Summary judgment is hereby

DENIED as moot with respect to Defendant's claim that Plaintiff's present disability bars this suit.

C. Retaliatory Motives

Assuming, *arguendo*, the ADA does apply in this situation, Defendant alleges Plaintiff has failed to offer enough evidence to support his allegations of retaliation to overcome Defendant's Motion for Summary Judgment, i.e., he has failed to establish a prima facie case. A three-step burden-shifting analysis has been developed by the Supreme Court for application in Title VII cases which also applies to ADA cases. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993) (citing Sorenson v. City of Aurora, 984 F.2d 349, 351 (10th Cir. 1993)). In order to support a claim of discrimination,

> [a] plaintiff first must establish a *prima facie* case of discrimination, typically consisting of proof that he or she was: (1) a member of a protected class, (2) qualified for the position, and (3) discharged in circumstances giving rise to an inference of discrimination. If the plaintiff carries that burden, the defense must articulate a legitimate, independent, nondiscriminatory reason for its action, and this operates to rebut a presumption of discrimination established by plaintiff's *prima facie* case. Then the plaintiff must show by a preponderance of the evidence that the defendant's proffered reasons are only a pretext for discrimination.

Fitzgerald v. Alleghany Corp., 904 F. Supp. 223, 230 (S.D.N.Y. 1995).

Assuming, *arguendo*, Plaintiff has established a prima facie case, the issue then becomes whether the Defendant has articulated a legitimate, nondiscriminatory reason for its action. Defendant

has met this burden. Defendant has offered numerous affidavits regarding Defendant's performance problems and the reasons for his termination. Plaintiff even admitted in his own testimony he had been warned on several occasions about his conduct. Plaintiff does not rebut any of Defendant's evidence in this regard but merely relies on the statement of one individual who stated he was told by Gary Bessent that Plaintiff was being brought to Tulsa to find a reason to fire him. However, this witness' testimony fails to state any reason why Defendant wanted to fire Plaintiff. The witness merely speculates it may have been because Plaintiff filed a charge, and the Tenth Circuit has held that speculation will not suffice for evidence. Doan v. Seagate Technology, Inc., 1996 WL 218838, 15 (10th Cir.). Additionally, in the same deposition, this witness also testified that Plaintiff deserved to be terminated, Plaintiff was given ample opportunities to succeed, and Plaintiff was not retaliated against. In Doan, the Court held a factfinder may only infer discrimination if the plaintiff produces evidence that the defendant's proffered explanation is pretextual and unworthy of credence. Id., citing, Ingels v. Thiokol Corp., 42 F.3d 616, 621 (10th Cir. 1994). Plaintiff has failed to accomplish this task.

In St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 2752, 125 L.Ed.2d 407 (1993), the Court held "a reason cannot be proved to be a 'pretext for *discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the

real reason." (emphasis in original). In the summary judgment context, the Plaintiff is required to

> [e]stablish a genuine issue of material fact either through direct, statistical, or circumstantial evidence as to whether the employer's reason for discharging her is false *and* as to whether it is more likely that a discriminatory reason motivated the employer to make the adverse employment decision.

Gallo v. Prudential Residential Services, 22 F.3d 1219, 1225 (2d Cir. 1994).

Plaintiff has not met this burden. Plaintiff's only evidence are his own conclusory statements and contradicting statements of one witness, some of which are hearsay. Plaintiff may not merely rely on conclusory statements. Goenaga v. March of Dimes Defects Foundation, 51 F.3d 14, 19 (2d Cir. 1995) (citing L&L Started Pullets, Inc. v. Gourdine, 762 F.2d 1, 3-4 (2d Cir. 1985); Wyler v. United States, 725 F.2d 156, 160 (2d Cir. 1983); Curl v. IBM Corp., 517 F.2d 212, 214 (5th Cir. 1975), cert. denied, 425 U.S. 943, 96 S.Ct. 1683, 48 L.Ed.2d 187 (1976)). Plaintiff alleges he was terminated in retaliation for filing discrimination charges. Not only does Plaintiff fail to prove this allegation, he offers no evidence to rebut that his performance warranted termination.

This Court is of the opinion that a genuine issue of material fact does not exist with respect to whether Plaintiff's discharge was discriminatory. Defendant is therefore entitled to judgment in its favor as a matter of law.

Thus, the Court hereby GRANTS Defendant's Motion for Summary Judgment on the issues of Plaintiff failing to file predicate charge under the ADA and Defendant retaliatory discharging

Plaintiff. The Court hereby DENIES Defendant's Motion for Summary Judgment on its contention that Plaintiff's alleged present full disability bars this action.

IT IS SO ORDERED THIS 23rd DAY OF MAY, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TONY E. VEYTIA,

Plaintiff,

v.

PANCHO'S MEXICAN BUFFET, INC.,

Defendant.

Case No. 95-C-574-B

J U D G M E N T

Pursuant to Order entered May 23, 1996, granting summary judgment in favor of the Defendant, Pancho's Mexican Buffet, Inc., and against the Plaintiff, Tony E. Veytia, in this case, judgment is herewith entered in favor of Defendant, Pancho's Mexican Buffet, Inc., and against the Plaintiff, Tony E. Veytia, in this case. Costs are assessed in favor of the Defendant and against the Plaintiff if timely applied for pursuant to Local Rule 54.1, and attorneys fees are to be borne by each respective party.

IT IS SO ORDERED this 23 day of May, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHNNY C. ORR; ROSE SHARON ORR; COUNTY TREASURER, Mayes County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma,

Defendants.

Civil Case No. 95-C 1085K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22 day of May, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Mayes County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, appear by Charles A. Ramsey, Assistant District Attorney, Mayes County, Oklahoma; and the Defendants, JOHNNY C. ORR and ROSE SHARON ORR, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, JOHNNY C. ORR, was served with process a copy of Summons and Complaint on March 7, 1996; that the Defendant, ROSE SHARON ORR, was served a copy of Summons and Complaint on December 18, 1995, by Certified Mail; that the Defendant, COUNTY TREASURER, Mayes County, Oklahoma, was served a copy of Summons and Complaint on November 1, 1995, by Certified Mail; and that Defendant, BOARD OF COUNTY

COMMISSIONERS, Mayes County, Oklahoma, was served a copy of Summons and Complaint on November 1, 1995, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Mayes County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, filed their Answer and Cross-Claim on November 6, 1995; and that the Defendants, JOHNNY C. ORR and ROSE SHARON ORR, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, JOHNNY C. ORR and ROSE SHARON ORR, are husband and wife.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Mayes County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lots Numbered 20, 21, 22, 23, 24, and 25 in Block 54 in the Town of Locust Grove, Mayes County, State of Oklahoma.

The Court further finds that on October 20, 1977, Steve E. Marshall and Mickey J. Marshall, executed and delivered to Mercury Mortgage Co., Inc., their mortgage note in the amount of $31,500.00, payable in monthly installments, with interest thereon at the rate of Eight and One-Half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Steve E. Marshall and Mickey J. Marshall, husband and wife, executed and delivered to Mercury Mortgage Co., Inc., a mortgage dated October 20, 1977, covering the above-

described property. Said mortgage was recorded on October 26, 1977, in Book 548, Page 233, in the records of Mayes County, Oklahoma.

The Court further finds that on November 9, 1977, MERCURY MORTGAGE CO., INC., assigned the above-described mortgage note and mortgage to PULASKI BANK AND TRUST COMPANY. This Assignment of Mortgage was recorded on November 10, 1977, in Book 549, Page 287, in the records of Mayes County, Oklahoma.

The Court further finds that on November 1, 1984, PULASKI BANK AND TRUST COMPANY, assigned the above-described mortgage note and mortgage to SIMMONS FIRST NATIONAL BANK OF PINE BLUFF. This Assignment of Mortgage was recorded on June 4, 1985, in Book 644, Page 271, in the records of Mayes County, Oklahoma.

The Court further finds that on May 15, 1989, Simmons First National Bank of Pine Bluff, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 7, 1989, in Book 701, Page 819, in the records of Mayes County, Oklahoma.

The Court further finds that Defendants, JOHNNY C. ORR and ROSE SHARON ORR, currently hold the title to the property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on June 1, 1989, the Defendants, JOHNNY C. ORR and ROSE SHARON ORR, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on July 1, 1991 and September 1, 1992.

The Court further finds that the Defendants, JOHNNY C. ORR and ROSE SHARON ORR, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, JOHNNY C. ORR and ROSE SHARON ORR, are indebted to the Plaintiff in the principal sum of $37,900.39, plus interest at the rate of 8.5 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Mayes County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $206.20, plus penalties and interest, for the year of 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, COUNTY TREASURER, Mayes County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $11.34 which became a lien on the property as of 1995. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, JOHNNY C. ORR and ROSE SHARON ORR, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, JOHNNY C. ORR and ROSE SHARON ORR, in the principal sum of $37,900.39, plus interest at the rate of 8.5 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.60 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Mayes County, Oklahoma, have and recover judgment in the amount of $206.20, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Mayes County, Oklahoma, have and recover judgment in the amount of $11.34, plus costs and interest, for personal property taxes for the year 1995, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, JOHNNY C. ORR, ROSE SHARON ORR and BOARD OF COUNTY COMMISSIONERS, Mayes County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, JOHNNY C. ORR and ROSE SHARON ORR, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, COUNTY TREASURER, Mayes County, Oklahoma, in the amount of $206.20, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, COUNTY TREASURER, Mayes County, Oklahoma, in the amount of $11.34, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

CHARLES A. RAMSEY, OBA #10116
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P.O. Box 845
Pryor, OK 74362
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,

Judgment of Foreclosure
Civil Action No. 95 C 1085K

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL SALADIN,

Plaintiff,

vs.

TERRY TURNER, individually and d/b/a THE FRENCH HEN RESTAURANT, and d/b/a CAPISTRANO RESTAURANT,

Defendant.

No. 94-C-702-K

JUDGMENT

This action came on for bench trial before the Court, Honorable Terry C. Kern, District Judge, presiding, and the decision having been duly rendered,

IT IS THEREFORE ORDERED that the Plaintiff Paul Saladin recover from the Defendant Terry Turner the sum of $6,548.63, with post-judgment interest thereon at the rate of 5.60 percent as provided by law.

ORDERED this 22 day of May, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL SALADIN,

Plaintiff,

vs.

TERRY TURNER, individually and d/b/a THE FRENCH HEN RESTAURANT, and d/b/a CAPISTRANO RESTAURANT,

Defendant.

No. 94-C-702-K

FINDINGS OF FACT
CONCLUSIONS OF LAW AND
O R D E R

This matter was tried to the Court without a jury on March 7, 8 and 11, 1996. Upon consideration of the pleadings, the briefs of the parties, and the evidence presented at the trial both by testimony and exhibit, the Court hereby enters its Findings of Fact and Conclusions of Law in accordance with Rule 52(a) F.R.Cv.P..

Findings of Fact

1. Plaintiff Paul Saladin was employed by the defendant Terry Turner as a waiter in the French Hen Restaurant from June, 1985 to sometime in October, 1993.

2. Defendant Terry Turner owns and operates an upscale restaurant in Tulsa, Oklahoma known as the French Hen. Turner operates the restaurant as a sole proprietor, but leaves the day-to-day operations to a manager.

3. Defendant was an employer of plaintiff within the meaning

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of the Americans with Disabilities Act (ADA) during 1993.

4. Defendant employed at least twenty-five employees, but less than one hundred employees, during all of 1992 and 1993.

5. Plaintiff was recognized as an excellent waiter by the French Hen management, his co-workers at the French Hen, and customers of the French Hen.

6. Plaintiff had a substantial number of "call customers", i.e., customers who would specifically request to be served by plaintiff.

7. Plaintiff is a homosexual male, and he had a long-term relationship with Ed Gaudin, with whom plaintiff lived. Gaudin had worked for defendant at defendant's other restaurant, but Gaudin was not employed by defendant at the times relevant to this case.

8. In the fall of 1987, Gaudin tested positive for human immunodeficiency virus (HIV) and plaintiff learned of his partner's infection.

9. Plaintiff was concerned he might also be infected with HIV and he shared this concern with a co-worker at the French Hen Restaurant.

10. In November 1987, the restaurant owner, defendant Terry Turner, became aware that plaintiff might be infected with HIV, and directed that plaintiff be suspended from his employment at the French Hen until he was tested by a physician for HIV. Saladin was tested, was found negative for HIV, and was allowed by Turner to

return to work.[1]

11. The length of plaintiff's 1987 suspension was approximately two weeks.

12. Plaintiff retrieved his liquor license from the French Hen and worked elsewhere while waiting for the test result.

13. In 1987, Defendant was concerned about the possibility of the transmission of HIV/AIDS to customers by casual contact.[2]

14. In October, 1992, plaintiff's partner, Ed Gaudin, developed symptoms consistent with AIDS, and was medically diagnosed with AIDS in February, 1993. Gaudin stopped working in December, 1992 as a result of health problems associated with his HIV status. He died of complications from AIDS in July, 1995.

15. Customers of the French Hen who knew plaintiff and/or Gaudin would occasionally ask plaintiff about Gaudin's health status, plaintiff's AIDS hospice volunteer work, and plaintiff's HIV/AIDS education activities. Plaintiff would respond to these customer inquiries, on occasion using the terms "HIV" or "AIDS".

16. Plaintiff was never requested or instructed to refrain from discussing HIV, AIDS and/or the health status of Ed Gaudin with customers of the French Hen prior to September 17, 1993.

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[1]Plaintiff filed no EEOC charge regarding this 1987 incident. The Court admitted evidence of the incident not as substantive proof, but as relevant background evidence. See Noland v. McAdoo, 39 F.3d 269, 271-72 (10th Cir.1994). The inference of "pattern" which plaintiff wishes the Court to draw is weak. Scientific knowledge regarding the communicability of HIV/AIDS has increased greatly since 1987.

[2]Defendant has not asserted in this action a defense based upon infectious or communicable diseases and food handling. See 42 U.S.C. § 12113(d)(2).

17. Immediately prior to plaintiff's regular shift on September 17, 1993, Jennifer Wallace, defendant's manager at the French Hen, met with plaintiff in the office of the French Hen and directed plaintiff to cease discussing his partner's AIDS condition while waiting on tables. This meeting lasted approximately ten minutes. Jennifer Wallace was defendant's manager of the French Hen during 1993, and she had authority to make decisions regarding plaintiff's employment on behalf of the defendant. The French Hen had no written rules of conduct for employees.

18. During this pre-shift meeting on September 17, 1993, Ms. Wallace informed plaintiff she had received a customer complaint from Reece Morrel concerning plaintiff's discussions of Ed Gaudin's health status in the restaurant. Although plaintiff stated he believed the policy unfairly cut him off from his customers, plaintiff indicated he would comply with Ms. Wallace's request. Ms. Wallace believed the matter had been resolved.

19. Plaintiff performed his duties as a waiter on the evening of September 17, 1993 without discussing the health status of Ed Gaudin in the French Hen.

20. After the conclusion of the shift on September 17, 1993, several employees gathered at the bar for coffee and drinks. These employees included Sondra Mauldin, Sonya Barrett, plaintiff, and Jennifer Wallace. Such post-shift get-togethers were common at the French Hen, and were regarded by staff as a time for relaxation and discussion.

21. At the post-shift get-together on September 17, 1993, Ms.

Wallace initiated a discussion of the request she had made of plaintiff before the shift by asking him if he had any questions regarding her request. At first, plaintiff indicated he had no questions, but upon the encouragement of the other staff, plaintiff asked questions about how he should handle customer inquiries about Gaudin's condition, his AIDS hospice work, and his AIDS education activities. A general discussion of the issue ensued. During this discussion, plaintiff was somewhat quiet and thoughtful, but acted normally. He did not act in a way that challenged or defied Ms. Wallace's authority, nor did he demonstrate disrespect toward Ms. Wallace. Ms. Wallace's testimony that plaintiff was "ranting and raving" and suggested he would not comply is not credible.[3]

22. At the conclusion of the September 17, 1993 post-shift gathering, plaintiff and Sondra Mauldin walked outside of the restaurant together. Outside the restaurant, plaintiff started crying, and stated to Ms. Mauldin that he would do as Ms. Wallace asked, because he would do anything to keep his job.

23. Plaintiff worked full evening shifts at the French Hen on September 18 and 21, 1993. During these work shifts, plaintiff fully complied with Ms. Wallace's request to refrain from discussing Gaudin's condition and other AIDS-related topics in front of the customers.

24. Sometime during the period between September 17, 1993 and

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[3]At trial, Sonja Barrett testified she thought plaintiff was challenging Wallace's authority in the post-shift meeting. She did not so testify in her deposition, and the Court discounts the credibility of the trial testimony.

September 22, 1993, plaintiff confided in his good friend Ruth Mitchell that he would do anything to keep his job. On September 20, 1993, plaintiff purchased a new pick-up truck.

25. On or about September 22, 1993, Ms. Wallace met with the defendant and informed him about her meeting with the plaintiff on September 17, 1993 and the reasons for that meeting. During the meeting between Ms. Wallace and the defendant, she informed him that Ed Gaudin had AIDS. Prior to this conversation, defendant had no knowledge Ed Gaudin was HIV positive or had AIDS.

26. Defendant knew plaintiff was homosexual and that he had an intimate, long-term relationship with another homosexual male, Gaudin.

27. During his September 22, 1993 meeting with Ms. Wallace, defendant instructed Wallace to suspend the plaintiff without pay for thirty days. Ms. Wallace agreed with this directive. This was the longest suspension imposed by defendant upon any French Hen employee during the entire period of plaintiff's employment at the restaurant. Another employee received only a two-week suspension for adding a tip to a customer's credit card bill without authorization.

28. Plaintiff's association and relationship with Ed Gaudin was a motivating factor in defendant's decision to suspend plaintiff for thirty days without pay.

29. On September 22, 1993, plaintiff was scheduled to work a regular evening shift at the French Hen. On September 22, 1993, Ms. Wallace telephoned plaintiff and requested he come to work

early, but did not state why. Plaintiff asked if he should dress for work, and Ms. Wallace said no. Based upon Ms. Wallace's secretive behavior and the events of the past several days, plaintiff believed he was about to be terminated from his job. At the suggestion of Mr. Gaudin, plaintiff brought a tape recorder with him to the restaurant.

30. Plaintiff met with Ms. Wallace at the French Hen on September 22, 1993. With Ms. Wallace's assent, plaintiff tape recorded the entire conversation between himself and Ms. Wallace. During this meeting, Ms. Wallace informed the plaintiff that defendant had directed her to suspend plaintiff for thirty days without pay. The stated reasons for the suspension were alleged customer complaints about plaintiff's discussions of Gaudin's health status in the restaurant and speculative concern that customers would be disturbed by the fact plaintiff was living with a person with AIDS. There was no mention of any insubordination on the part of plaintiff.

31. Although Ms. Wallace testified there were numerous complaints both from customers and French Hen staff, she could identify only one complaining customer. At trial, this customer denied making a complaint, although he did testify he asked to be seated elsewhere in the restaurant than the area served by plaintiff. Moreover, four former and current members of the French Hen staff denied making any complaints. The one other French Hen staff member identified as having made a complaint is still employed at the French Hen, but was not called as a witness by the

defendant. There is no credible evidence that any customers or staff complained regarding plaintiff's behavior in the restaurant.

32. Immediately after the suspension, plaintiff made numerous efforts to contact the defendant, because plaintiff believed there had been some miscommunication. Defendant did not return plaintiff's telephone calls.

33. During plaintiff's suspension from the French Hen, plaintiff's friend Gary Mitchell, a restaurant owner, indicated to plaintiff that he might have some temporary work for plaintiff in catering parties. Mitchell indicated plaintiff would need his liquor license to perform this temporary work.

34. On October 6, 1993, plaintiff went to the French Hen to retrieve his liquor license. He did not retrieve pens which he had specially purchased for use in the restaurant. While in the restaurant, plaintiff visited with Sondra Mauldin and Susie Thomas about his trip with Gaudin to visit Gaudin's parents, a movie he and Gaudin had just seen, and other small talk. Plaintiff never said anything to these co-workers about quitting his job at the French Hen, nor did plaintiff engage in any behavior that would suggest he was quitting his employment. When asked by employee Tracy Berna what he would do if he did not have his job anymore, plaintiff replied he might have to speak with a lawyer.

35. Ms. Wallace received a report of the events of October 6, 1993 from a seventeen year old back waiter (bus boy) named Ryan Wheeler. Wheeler reported plaintiff said he would not be there anymore. Wallace made no effort to verify the report she received

from Wheeler with plaintiff. Wallace told defendant of the report she received from Wheeler, including the comment about plaintiff talking with a lawyer.

Gary Mitchell testified that in his long experience as a restaurant manager and owner, he would not have relied upon the report of a teenage bus boy that an employee of long standing had resigned. Mitchell opined that sound restaurant management practice would have been to verify the report directly with the employee in question.

36. From October 10, 1993 through October 14, 1993, plaintiff was in Detroit, Michigan visiting his mother. The arrangements and payment for this trip had been made before September 17, 1993.

37. On October 12 and 13, 1993, the French Hen ran a classified advertisement in the Tulsa World for a waiter. The advertisement indicated interviews would be conducted on October 13 and 14, 1993. Plaintiff did not learn of this advertisement until late on the night of October 14, 1993.

38. On October 15, 1993, plaintiff telephoned Jennifer Wallace at the French Hen. Plaintiff told Wallace he would be ready to return to work at the end of his suspension on October 22, 1993, and inquired about the newspaper advertisement. Wallace informed the plaintiff he no longer had a job at the French Hen and he was being replaced.

39. Testifying as a rebuttal witness, Sondra Mauldin testified that approximately one week after plaintiff's October 15, 1993 telephone conversation with Wallace, Wallace commented to

Mauldin in reference to the plaintiff, "I had to let him go."

40. In late October, 1993, Wallace called Reece Morrel on the telephone, requesting Morrel provide a written statement explaining why he requested not to be seated in plaintiff's section in the restaurant. Morrel declined to provide the statement. During this telephone conversation, Wallace told Morrel the French Hen had "terminated" plaintiff.

41. Plaintiff was discharged from his employment sometime between October 6, 1993 and October 15, 1993.

42. Shortly after the October 15, 1993 telephone conversation between Wallace and plaintiff, Wallace informed defendant of the substance of the conversation, including plaintiff's statement of readiness to return to work.

43. Plaintiff made several efforts to contact defendant by telephone concerning his employment at the French Hen. Defendant failed to return any of plaintiff's calls. Plaintiff reached defendant on the telephone on or about October 18, 1993, but defendant stated he was busy and hung up the telephone.

44. On October 18, 1993, plaintiff submitted an application for unemployment benefits. The French Hen hired Guy Seaman to replace plaintiff. Seaman worked on October 15, 16 and 18, 1993, and then failed to return to work. The French Hen replaced Seaman with Allison Gallagher on or about November 1, 1993.

45. Defendant knew plaintiff wanted to return to his employment at the French Hen at the time Seaman left his employment with the French Hen. The defendant also knew the French Hen had an

opening for a waiter on or about October 19, 1993, before the expiration of plaintiff's suspension. Defendant made no effort to reinstate plaintiff at this time.

46. On or about October 25, 1993, Wallace submitted a written statement to the Oklahoma Employment Security Commission (OESC) in connection with plaintiff's application for unemployment benefits. This written statement is the first mention of defendant's claim that plaintiff was insubordinate to the restaurant manager Wallace.

47. Wallace told plaintiff that defendant had instructed her to prepare the written statement to the OESC, and further instructed her to claim plaintiff was insubordinate and had quit his employment.

48. Plaintiff submitted a charge of discrimination to the Equal Employment Opportunity Commission on October 28, 1993. Sometime between November 23, 1993 and December 13, 1993, defendant was notified plaintiff had filed a charge of discrimination.

49. In late November, 1993, plaintiff obtained employment as a waiter at Mondo's Restaurant in Tulsa, Oklahoma.

50. On December 6, 1993, defendant received a demand letter from plaintiff's attorney threatening suit, claiming discrimination, and claiming plaintiff had been wrongfully terminated from his employment. On December 14, 1993, defendant visited with his attorney in connection with this case for the first time.

51. Plaintiff's application for unemployment benefits was initially denied, and plaintiff appealed to the OESC Appeal

Tribunal. The OESC Appeal Tribunal found plaintiff was discharged from his employment at the French Hen, that plaintiff was suspended from his employment at the French Hen because of alleged customer complaints about his discussions of Gaudin's condition in the restaurant, and that plaintiff's discharge was not for misconduct. The decision was mailed to plaintiff and defendant December 17, 1993.

52. On December 17, 1993, the day after the unemployment appeal hearing, defendant called plaintiff's home in the evening. Ed Gaudin answered the telephone and a conversation ensued. Turner asked Gaudin if Gaudin were indeed ill, and Gaudin replied he was. Turner knew a doctor in Arkansas who was treating AIDS patients with good results, and offered to give Gaudin the name of the doctor. Turner has a close family member who is HIV positive, and he had some knowledge about the condition and the treatment.

During this conversation, Gaudin said he had been instructed by his doctor to avoid stress, and that he wanted to be left out of the conflict between plaintiff and defendant. Defendant, however, asked Gaudin why plaintiff was suing defendant, and asserted plaintiff was fabricating some of the facts asserted in the proceeding.

53. Shortly before Christmas, 1993, plaintiff was employed as a waiter at Karmichael's Restaurant in Tulsa, Oklahoma. Karmichael's is a restaurant that provides a dining experience similar to the French Hen.

54. In early January, 1994, plaintiff's counsel received a

written offer of employment reinstatement from defendant's attorney. This offer was communicated to plaintiff by his attorney. On January 21, 1994, plaintiff communicated through his attorney his rejection of the reinstatement offer. On January 24, 1994, defendant's counsel reiterated the reinstatement offer to plaintiff's counsel and gave a deadline of January 28, 1994 for its acceptance. Plaintiff allowed the deadline to expire, making no counter-offer.

55. Plaintiff rejected defendant's offer of reinstatement based upon what he feared would be defendant's continued hostility and defendant's looking for an opportunity to discharge plaintiff again. Plaintiff testified he feared he would be fired again if he were "thirty seconds late." Plaintiff also noted he already had what he believed to be a secure job at Karmichael's. Earlier in his direct testimony, plaintiff testified Turner had always been fair with him, except for the 1987 HIV testing incident and the 1993 suspension. Plaintiff also testified he had experienced no hostility from Jennifer Wallace during his term of employment.

To the extent any of these Findings of Fact constitute Conclusions of Law, they should be so considered.

Conclusions of Law

1. This suit arises under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. The ADA provides "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual. . . ." 42

U.S.C. § 12112(a). "Qualified individual with a disability" is defined at 42 U.S.C. § 12111(8). "Disability" is defined at 42 U.S.C. § 12102(2). For purposes of this action, defendant does not dispute HIV/AIDS is a disability under the ADA.[4] Homosexuality is not a disability under the ADA. 42 U.S.C. § 12211(a).

2. The Court has jurisdiction over the persons and subject matter jurisdiction exists pursuant to 28 U.S.C. § 1331. Plaintiff has exhausted administrative remedies.

3. The plaintiff was an employee of the defendant within the meaning of 42 U.S.C. § 12111(4). The defendant is an employer subject to the provisions of the ADA. 42 U.S.C. § 12111(5).

4. Venue is proper in this judicial district. 42 U.S.C. § 2000e-5(f)(3); 28 U.S.C. § 1391.

5. Plaintiff asserts three distinct claims. Plaintiff asserts a claim under 42 U.S.C. § 12102(2)(C), which provides an alternative definition of disability as being regarded as having a physical or mental impairment that substantially limits one or more of the major life activities of an individual. "A person is 'regarded as having' an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment." Wooten v. Farmland Foods, Inc., 58 F.3d 382, 385 (8th Cir.1995). "The focus is on the impairment's effect upon the attitude of others." Id.

As framed in the Pretrial Order, the issue presented is

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[4]The Court has concluded that Ed Gaudin, certainly after the development of AIDS, was disabled under the definition of 42 U.S.C. § 12102(2)(A).

"[w]hether plaintiff was discriminated against by defendant because he was regarded as having a disability within the meaning of the ADA because of his association and relationship with Ed Gaudin." (Pretrial Order, Section V.G.).

In other words, plaintiff views this claim as virtually indistinguishable from the "association" claim. The Court disagrees. Insufficient evidence was presented that plaintiff himself was regarded as having HIV or AIDS to sustain a "regarded as" claim.

Plaintiff also asserts a claim under 42 U.S.C. § 12203(a) for retaliation. The complaint cites a single instance, the December 17, 1993 phone call from Turner to Gaudin. The EEOC charge filed by plaintiff does not mention retaliation. Defendant seeks to exclude any claim of retaliation. The Court will consider this one instance, over defendant's legal objection. Brown v. Hartshorne Public School Dist., 864 F.2d 680 (10th Cir.1988) holds that retaliatory acts occurring after the filing of an EEOC charge are reasonably related to the original charge, obviating the need for a new or amended charge. This Court's order of August 9, 1995, denying plaintiff leave to amend complaint, was based upon plaintiff's representations that he sought to add a state law claim for wrongful discharge in violation of public policy. Plaintiff's claim of retaliation has been present in this case from the filing of the original complaint.

However, during the trial plaintiff sought to present other instances of alleged retaliation (e.g., defendant's failure to

verify the report of plaintiff's supposed resignation, and defendant's refusal to put plaintiff back to work when defendant knew plaintiff wanted to return to work and there was an opening for a waiter) and to argue that defendant was also motivated by plaintiff's "good faith opposition to practices plaintiff thought were unlawful under the ADA" and his suggestion to others he might get a lawyer. The Court now rejects consideration of this line of argument, for failure to exhaust administrative remedies. Plaintiff's questioning of Wallace's directive and his comment about obtaining counsel were made before he filed his EEOC charge and do not fall within the rule of Brown v. Hartshorne Public School District. Alleged retaliation of this type should have been raised in the EEOC charge. In view of this ruling, the Court need not consider whether (1) mere opposition to an employer's "speech code" as unfair and (2) the mere suggestion to a co-employee that one might seek an attorney constitute "protected conduct" for purposes of a retaliation claim.

In order to succeed on a claim of discriminatory retaliation, a plaintiff must show (1) that he engaged in protected conduct; (2) that he was subject to an adverse employment action subsequent to such activity; and (3) that a causal link exists between the protected activity and the adverse action." Barber v. CSX Distribution Servs., 68 F.3d 694, 701 (3rd Cir.1995). Plaintiff has failed to establish this claim as well. The phone call to Gaudin by Turner did not constitute adverse employment action. In no way did it alter the terms and conditions under which plaintiff

worked. In any event, the Court does not view the phone call to a third party as retaliatory in nature. It was at worst a clumsy, inappropriate attempt at fact-finding on Turner's part, but was not designed to injure plaintiff in any way.

The Court next considers plaintiff's third asserted claim, alleging a violation of 42 U.S.C. § 12112(b)(4), which proscribes discrimination against a qualified individual because of that person's association or relationship with a person with a disability. Plaintiff has made out a prima facie case of discrimination because of association. A prima facie case of discrimination under the ADA in this case consists of proof by a preponderance of the evidence that (1) plaintiff was in the protected class; (2) plaintiff was able to perform the essential functions of the job; (3) employer terminated him because of his association with a disabled person. Cf. White v. York Intern. Corp., 45 F.3d 357, 360-61 (10th Cir.1995). The evidence supports the conclusion plaintiff was discharged by defendant. Defendant cannot rely upon any "good faith" belief that plaintiff had quit, because defendant and his agent Wallace failed to make even a cursory investigation of the facts.

6. The burden shifts to defendant to articulate his legitimate, nondiscriminatory reasons for acting. The plaintiff must then show the defendant's articulated reasons to be pretextual, and prove that intentional discrimination was the employer's true motivation. Randle v. City of Aurora, 69 F.3d 441, 453 n.18 (10th Cir.1995).

7. For purposes of a thorough analysis, the Court concludes defendant has articulated a legitimate nondiscriminatory reason for his action. That is to say, considered in the abstract, the Court holds a restaurant owner can place certain restrictions on employees' speech. A restaurant owner could legitimately conclude that a waiter's discussion of his partner's medical condition (whatever its nature), even upon inquiry from a customer, might be offensive to other customers who come to enjoy a "fine dining" experience. Accordingly, a properly crafted "speech code" could be enforced, if proper notice were given to employees.[5] The Court stresses this conclusion is "in the abstract", because the facts of this case demonstrate the reason to be pretextual.

8. Plaintiff has met his ultimate burden of proving discrimination on the part of defendant. Plaintiff's relationship and association with a person with a disability was a motivating factor in the defendant's decision to suspend and discharge the plaintiff from his employment at the French Hen, and defendant thereby engaged in unlawful discrimination under the ADA.

9. Wallace testified that customers being concerned about plaintiff's association with Gaudin was a factor in the suspension. Under the ADA, effect may not be given to the public's fears or stereotypes. Cf. Doe v. District of Columbia, 796 F.Supp. 559, 570 (D.D.C. 1992); Den Hartog v. Wastach Academy, 909 F.Supp. 1393,

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[5]Plaintiff's counsel conceded in closing argument a waiter could be prohibited from openly discussing the "gory details" of a disease. It seems to the Court a restaurant owner is entitled to err on the side of protecting his customers' sensibilities, so long as this protection is within the law.

1400 (D.Utah 1995)("[T]he ADA association provision is targeted at prohibiting unfounded stereotypes and assumptions against employees who associate with disabled people.")

10. Defendant's claims that plaintiff was insubordinate and that plaintiff resigned his employment with the French Hen are pretexts to conceal defendant's true motive of discrimination that resulted in the suspension and discharge of plaintiff. Wallace made no mention of insubordination at the September 22 meeting between herself and plaintiff. Defendant or Wallace did not mention insubordination until their OESC filing.

11. Plaintiff was given an 30-day suspension without pay without being provided a concrete reason, and with no prior warnings or lesser discipline. Wallace is not credible when she testified plaintiff suggested he would not comply with her directive. Plaintiff's sanction was harsher than that given to other employees' infractions, including an employee who falsified a credit card bill. Plaintiff was given rules for conduct but no time to abide by them. No credible evidence was presented of any complaints or occurrences in violation of Wallace's directive.

12. The Court concludes that back pay must be cut off as of January 28, 1994. That date was the expiration of Turner's offer of reinstatement. An ADA claimant must exercise reasonable efforts to mitigate his or her damages. Defendant argues that it made an offer of reinstatement to plaintiff which he refused. Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) holds an employer can toll the further accrual of back pay liability by making an unconditional

offer of reinstatement to the claimant. Plaintiff contends the offer was not bona fide and made in good faith, so he was justified in rejecting it.

Ford Motor did not discuss good or bad faith. Stanfield v. Answering Service, Inc., 867 F.2d 1290 (11th Cir.1989) did suggest, as a prerequisite to the tolling rule, an offer of reinstatement must be made in good faith. See also Lewis v. Federal Prison Industries, 953 F.2d 1277 (11th Cir.1992). "Special circumstances" (e.g., having to move a great distance to find a replacement job) may make it justifiable for claimant to refuse a bona fide offer. Ford Motor, 458 U.S. at 238 & n.27.

However, the Court in Ford Motor also grounded its rule upon the statutory duty of claimants to mitigate their damages. 458 U.S. at 231. Courts have held the proper test of whether a plaintiff is justified in rejecting an offer of reinstatement is an objective one, examining whether a reasonable person in the claimant's position would decline the offer. Morris v. Amer. Nat. Can Corp., 952 F.2d 200, 203 (8th Cir.1991). Thus, it would seem the question of whether the offer was bona fide merges with the issue of whether it was reasonably rejected. See Miano v. AC & R Advertising, Inc., 875 F.Supp. 204, 223-24 (S.D.N.Y.1995).

In Giandonato v. Sybron Corp., 804 F.2d 120 (10th Cir.1986), the Tenth Circuit took a strict interpretation, stating "an employee is obligated to minimize his damages by accepting his employer's offer of reinstatement to his previous job. . . ." Id. at 124 (emphasis added). The court said the plaintiff did not

comply with Ford Motor by refusing an offer for "personal reasons" such as not wanting to work under the same manager. Id.

The employer bears the burden to prove it made an unconditional offer of reinstatement and that the plaintiff's rejection of it was objectively unreasonable. Smith v. World Ins. Co., 38 F.3d 1456, 1465 (8th Cir.1994). Defendant has met his burden. Plaintiff's mere recitation of hostility (some of it fanciful, as his fear he would be fired if he were thirty seconds late) is insufficient, because "[a]ntagonism between parties occurs as the natural bi-product [sic] of any litigation." Taylor v. Teletype Corp., 648 F.2d 1129, 1139 (8th Cir.1981). This Court acknowledges evidence of pervasive, intense hostility might qualify as "special circumstances" under Ford Motor. This is not such a case. Similarly, characterizing a reinstatement offer as a "litigation tactic", as plaintiff does, could be done in any discharge case. Proof that the offer, if accepted by plaintiff, would not have been honored by defendant, is lacking.

If plaintiff feared returning to work would bring retaliation, plaintiff was obligated to take reasonable steps to address and attempt to resolve the perceived problem. Turner had promised no retaliation would take place, and offered to discuss with plaintiff proposals plaintiff might present on how retaliation could be prevented. In failing to respond to Turner's offer to discuss how retaliation could be prevented, plaintiff failed to act reasonably.

13. In support of his argument regarding the reinstatement offer, defendant sought to introduce the letters from attorney

Thomas Robertson to attorney Katrina Bodenhamer (defendant's exhibits 4, 5 and 6) which set forth and reiterate the offer. Plaintiff objected to admission of the letters and the Court took the objection under advisement. The Court now admits the letters. During the discovery process in this case, plaintiff propounded questions to defendant regarding his consultations with counsel as they related to the decision to make the reinstatement offer (in an effort to demonstrate lack of good faith in the offer.) Defendant objected, citing attorney-client privilege, and a motion to compel was denied. Plaintiff contends the letters are hearsay and self-serving declarations by a lawyer who cannot be cross-examined.

Plaintiff does not describe any alternative method for communicating an offer of reinstatement. With both parties represented by counsel, it would have been improper for defendant to directly communicate the offer to plaintiff. At trial, defendant was available for cross-examination as to his intent and thought processes in formulating the offer. The only restricted area of inquiry was communications between lawyer and client.

Defendant is not using the attorney-client privilege as "sword and shield", as in the criminal cases cited by plaintiff. Defendant is not selectively revealing privileged communications and protecting others; the letters communicating the offers are not within the privilege. In Miano v. AC & R Advertising, Inc., 875 F.Supp. 204 (S.D.N.Y.1995), after a bench trial, the court, while addressing a Ford Motor reinstatement offer, made abundant references to letters between attorneys offering reinstatement and

responding to the offer.

To the extent the letters constitute hearsay, the Court concludes the requisites of Rules 803(24) and 804(b)(5) F.R.Evid. are satisfied, and the letters properly admitted. Plaintiff had requested that, if the Court admits the Robertson letters, the letters in response by Bodenhamer (plaintiff's exhibits 10 and 11) should also be admitted. The Court so rules, and has considered the Bodenhamer letters as well in its ruling on the reinstatement offer issue.

14. Defendant seeks to exclude plaintiff's exhibit 7, various records from the proceedings before the Oklahoma Employment Security Commission (OESC). Defendant relies upon an Oklahoma statute, 40 O.S. § 2-610A, which directs that no findings, conclusions or final orders of the OESC shall be considered binding upon a subsequent tribunal or be used in evidence in another proceeding. "The governing principle is easily stated. If a [Federal] Rule of Evidence covers a disputed point of evidence, the Rule is to be followed, even in diversity cases, and state law is pertinent only if and to the extent the Rule makes it so." 19 Wright, Miller & Cooper, Federal Practice and Procedure, § 4512 at 190 (footnote omitted). Applying Federal Rules of Evidence 803(8) and 401, the Court hereby admits plaintiff's exhibit 7, not as binding prior adjudication, but for such relevance as it has. The Court also admits the EEOC materials (plaintiff's exhibit 6) for such relevance as they have. The Court also admits plaintiff's exhibit 5, hand written notes reflecting the content of the

telephone conversation between Ed Gaudin and Turner. Although it does not appear Gaudin actually wrote the notes, he adopted them through his signature. They constitute "recorded recollection" under Rule 803(5) F.R.Evid.

15. The Court has ruled plaintiff is only entitled to lost wages from the date of his suspension on September 22, 1993 through expiration of defendant's reinstatement offer on January 28, 1994. According to the calculation contained in plaintiff's exhibit 14, plaintiff is hereby awarded lost wages in the amount of $4,048.63.

Plaintiff also seeks an award for "emotional pain, suffering, inconvenience, mental anguish, [and] loss of enjoyment of life". See 42 U.S.C. § 1981a(b)(3). Compensatory damages may be recovered under the ADA. 42 U.S.C. § 1981a(a)(2). As defendant notes, a mitigating factor is plaintiff's concern during the same time period over his partner's illness and medical care, for which defendant is not responsible. However, plaintiff offered sufficient proof that his improper suspension and discharge exacerbated his existing emotional distress. The relationship was direct, because plaintiff relied on his salary to help care for his partner. The plaintiff is hereby awarded compensatory damages in the amount of $2,500.00.

Plaintiff requests an award of punitive damages as well. Such an award may be made if the fact-finder concludes the defendant engaged in a discriminatory practice or discriminatory practices "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. §

1981a(b)(1). The Court finds defendant's actions do not rise to this level. Defendant was motivated, in part, by concern that the spreading of rumors, both inside and outside the restaurant, would result in patrons ceasing to dine there. The closing of the French Hen would have resulted in plaintiff, and all other employees, losing their jobs. The ADA requires an employer to tread carefully, observing legal requirements while attempting to maintain customers. While it may be proven in a courtroom that customers' concerns about HIV/AIDS transmission take root in "irrational fears and stereotypes", a restaurant owner must strike a delicate balance. The Court finds defendant violated the ADA, but did not do so maliciously.

Finally, plaintiff seeks attorney fees pursuant to 42 U.S.C. § 12205. The Court finds plaintiff is the prevailing party in this action and, in its discretion, the Court awards plaintiff reasonable attorney fees and costs. Recovery depends upon proper request and documentation. See Local Rules 54.1 and 54.2.

To the extent any of these Conclusions of Law constitute Findings of Fact, they should be so considered.

It is the Order of the Court that judgment be entered for plaintiff and against defendant in the amount of $6,548.63.

ORDERED this 22 day of May, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT R. HORTON,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of the Social Security Administration,

Defendant.

Case No. 95-C-943-W

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further evaluation of the plaintiff's physical impairments and to obtain supplemental vocational evidence, pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

DATED this 21st day of May, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

13

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

CATHRYN McCLANAHAN, OBA #14853
Assistant United States Attorney
333 W. Fourth St., Suite 3460
Tulsa, OK 74103-3809

ENTERED ON DOCKET
DATE 5/24/96

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAY 23 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT R. HORTON,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION,

Defendant.

Case No: 95-C-943-W

JUDGMENT

Judgment is entered in favor of Robert R. Horton pursuant to this court's Order filed May 22, 1996 remanding case to the Defendant for further evaluation of the plaintiff's physical impairments and to obtain supplemental vocational evidence pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

Dated this 22nd day of May, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:jud.sent4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ONE PARCEL OF REAL PROPERTY KNOWN AS:

E/2 NW/4 SE/4 AND W/2 NE/4 SE/4 (40.0 ACRES)

and

ONE PARCEL OF REAL PROPERTY KNOWN AS:

E/2 W/2 NW/4 SE/4 (10.0 ACRES)

ALL IN SECTION 29, TOWNSHIP 18 NORTH, RANGE 10 EAST, CREEK COUNTY, OKLAHOMA, AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON,

Defendants.

Case No. 92-C-037-E

ORDER

Now before the Court is the Motion for Summary Judgment (Docket #34) of the Plaintiff, United States of America.

The government seeks summary judgment on its claim for civil forfeiture of two parcels of real property owned by Melvin Gann. The government contends that the properties are forfeitable pursuant to 21 U.S.C. §881 (a)(7) because they were used to facilitate the possession and distribution

of marijuana, in violation of Title 21 of the United States Code.

In a forfeiture proceeding, the government must establish probable cause for the institution of the forfeiture action. United States v. $149,442.43 in U.S. Currency, 965 F.2d 868, 876 (10th cir. 1992). To establish probable cause, "the government must demonstrate a reasonable ground for belief of guilt supported by less than prima facie proof, but more than mere suspicion." Id. Circumstantial evidence and hearsay may be used to establish probable cause. United States v. One Parcel Property Located at Lot 85, Country Ridge, 894 F.Supp. 397, 404 (D. Kan. 1995). Once probable cause has been established, the burden shifts to the claimant to establish a defense to forfeiture by a preponderance of the evidence. $149,442.43 in U.S. Currency, 965 F.2d at 877. "Summary Judgment ordering forfeiture is appropriate when the government establishes probable cause and the claimant fails to show that the facts constituting probable cause did not exist." United States v. On Leong Chinese Merchants Association Building, 918 F.2d 1289, 1292 (7th Cir. 1990).

In this case, the government relies on the affidavit of Federal Bureau of Investigation Special Agent James M. Hawkins in establishing probable cause. Agent Hawkins' affidavit establishes the following facts: 1) Linda Hubanks told him that she was aware of at least 28 distributions of marijuana to Gann; 2) Hubanks told him that Gann buried on his property the money he used to purchase the marijuana; 3) although Gann told the Probation office that his longest employment was with Armour Meat Packing from 1967 to 1978, and prior to his arrest he was earning approximately $13,100 per year, he claimed to value of his assets was $149,832.50; 4) Jimmie Lee Pann, a co-conspirator, testified at the criminal trial to making two deliveries of 20-25 pounds of marijuana to Gann at his residence in Creek County.

In arguing that the government has not established probable cause and that summary judgment

is not appropriate, Gann asserts that the government's evidence "constitutes mere suspicion," and that genuine issues of material fact, when considered in a light most favorable to him, would permit a finder of fact to conclude that the Defendant property was not used to facilitate marijuana trafficking. The genuine issue of material fact upon which Gann relies, however, is the fact that Pann, on cross examination, was "unable to identify with any certainty where he made the alleged delivery." The transcript reveals, however, that Pann displayed no uncertainty at to whether he made a delivery to Gann's house, he simply was unable to answer a question about whether the property was closer to Sapulpa than Kellyville.

The Court finds that the affidavit of Agent Hawkins, when read in its entirety, is sufficient to establish probable cause. Moreover, the questions alluded to by claimant of Pann are neither sufficient to place his credibility into question, nor sufficient to raise a genuine issue of material fact. See, e.g., United States v. Real Property Located at Incline Village, 47 F.3d 1511 (9th Cir. 1995)(an attack on the credibility of the declarant in an affidavit supporting probable cause goes to the weight of the evidence, not its admissibility, and is immaterial for summary judgment purposes).

Plaintiff's motion for summary judgment (Docket #34) on probable cause is granted. The Plaintiff is directed to submit a proposed judgment within 20 days from the date of this Order.

IT IS SO ORDERED THIS 23rd DAY OF MAY, 1996.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL S. HOLLAWAY; KAREN B. HOLLAWAY; CITY OF SAND SPRINGS, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95cv 1094BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22nd day of May, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, CITY OF SAND SPRINGS, Oklahoma, appears by its Attorney, Ronald D. Cates; and the Defendants, MICHAEL S. HOLLAWAY and KAREN B. HOLLAWAY, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, CITY OF SAND SPRINGS, Oklahoma, acknowledged receipt of Summons and Complaint on November 3, 1995, by Certified Mail.

The Court further finds that the Defendants, MICHAEL S. HOLLAWAY and KAREN B. HOLLAWAY, were served by publishing notice of this action in the Tulsa Daily

NOTE: THIS ORDER IS TO BE MAILED [illegible] COUNSEL AND [illegible] IMMEDIATELY

Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning February 22, 1996, and continuing through March 28, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, MICHAEL S. HOLLAWAY and KAREN B. HOLLAWAY, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, MICHAEL S. HOLLAWAY and KAREN B. HOLLAWAY. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on November 16, 1995; that the Defendant, CITY OF SAND SPRINGS, Oklahoma, filed its Answer on November 9, 1995; and that the Defendants, MICHAEL S. HOLLAWAY and KAREN B. HOLLAWAY, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, MICHAEL S. HOLLAWAY and KAREN B. HOLLAWAY, are husband and wife. Roma Janell Sanny, is one and the same person as R. Janell Sanny.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

THE SOUTH HALF (S/2) OF LOT FOUR (4), AND ALL OF LOT FIVE (5), BLOCK FORTY (40), OAK RIDGE SECOND ADDITION TO THE TOWN, NOW CITY OF SAND SPRINGS, COUNTY OF TULSA, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on November 7, 1985, Roma Janell Sanny and Charles G. Sanny, executed and delivered to FIRSTIER MORTGAGE CO., their mortgage note in the amount of $45,950.00, payable in monthly installments, with interest thereon at the rate of eleven and one-half percent (11.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Roma Janell Sanny and Charles G. Sanny, husband and wife, executed and delivered to FIRSTIER MORTGAGE CO., a mortgage dated November 7, 1985, covering the above-

described property. Said mortgage was recorded on November 12, 1985, in Book 4905, Page 1354, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 30, 1986, FIRSTIER MORTGAGE CO., assigned the above-described mortgage note and mortgage to LEADER FEDERAL SAVINGS & LOAN ASSOCIATION. This Assignment of Mortgage was recorded on November 26, 1986, in Book 4985, Page 1074, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 15, 1990, LEADER FEDERAL BANK FOR SAVINGS, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on April 24, 1990, in Book 5248, Page 2339, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 16, 1989, Charles G. Sanny and R. Janell Sanny, husband and wife, granted a general warranty deed to Michael S. Hollaway and Karen B. Hollaway, husband and wife. This deed was recorded with the Tulsa County Clerk on August 18, 1989, in Book 5201, Page 2373 and the Defendants, MICHAEL S. HOLLAWAY and KAREN B. HOLLAWAY, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on May 1, 1990, the Defendants, MICHAEL S. HOLLAWAY and KAREN B. HOLLAWAY, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on July 1, 1991.

The Court further finds that the Defendants, MICHAEL S. HOLLAWAY and KAREN B. HOLLAWAY, made default under the terms of the aforesaid note and mortgage,

as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, MICHAEL S. HOLLAWAY and KAREN B. HOLLAWAY, are indebted to the Plaintiff in the principal sum of $71,478.49, plus interest at the rate of 11.5 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $518.00, plus penalties and interest, for the year of 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma and CITY OF SAND SPRINGS, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of nuisance abatement assessments in the amount of $191.00, plus penalties and interest, for the year of 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $24.00 which became a lien on the property as of June 26, 1992, a lien in the amount of $31.00 which became a lien on the property as of June 25, 1993, and a lien in the amount of $30.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, MICHAEL S. HOLLAWAY and KAREN B. HOLLAWAY, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, MICHAEL S. HOLLAWAY and KAREN B. HOLLAWAY, in the principal sum of $71,478.49, plus interest at the rate of 11.5 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the current legal rate of 5.60 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $518.00, plus penalties and interest, for ad valorem taxes for the year 1995, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma and CITY OF SAND SPRINGS, Oklahoma, have and recover judgment in the amount of $191.00, plus penalties and interest, for nuisance abatement assessments, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $85.00, plus costs and interest, for personal property taxes for the years 1991, 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, MICHAEL S. HOLLAWAY, KAREN B. HOLLAWAY and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, MICHAEL S. HOLLAWAY and KAREN B. HOLLAWAY, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $518.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of Defendants, COUNTY TREASURER, Tulsa County, Oklahoma and CITY OF SAND SPRINGS, Oklahoma, in the amount of $191.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Fourth:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fifth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $85.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right

to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

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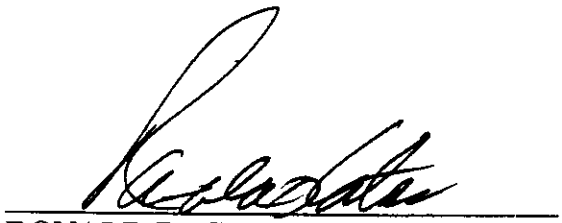
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



RONALD D. CATES, OBA #1565
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(918) 582-7447
Attorney for Defendant,
City of Sand Springs, Oklahoma

Judgment of Foreclosure
Civil Action No. 95cv 1094BU

LFR:flv

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAY 22 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CARLTON ENTERPRISES, INC., d/b/a Don Carlton Honda,

Plaintiff,

vs.

DEALER COVER, INC., et al.,

Defendants.

Case No. 95-C-1055-BU

ENTERED ON DOCKET
DATE MAY 23 1996

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 22nd day of May, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 5-23-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ADOLPH CRISP;
BETTY L. CRISP;
PREMIUM PROCESSED METALS, INC.;
HERMAN A. SINGER;
BEST YET FOODS;
STATE OF OKLAHOMA ex rel.
Oklahoma Tax Commission;
ALLPARTS U-PULL AND SAVE, INC.;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,
GENERAL PROPERTY MANAGEMENT CO.;
STATE OF OKLAHOMA ex rel.
Oklahoma Employment Security Commission;

Defendants.

FILED

MAY 22 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 95-C-269-H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 22nd day of May, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney; the Defendants, **Adolph Crisp and Premium Processed Metals, Inc.**, appear by their attorney George Underwood; the Defendant, **Herman A. Singer**, appears by his attorney C. Bruce Jones; the Defendant, **Best Yet Foods**, appears by its attorney Janelle H. Steltzlen; the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, **Allparts U-Pull And Save, Inc.**, appears by its attorney Michael D. Davis; the Defendants, **County Treasurer, Tulsa County,**

Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, **General Property Management Co.**, appears by its attorney George Underwood; the Defendant, **State of Oklahoma ex rel. Oklahoma Employment Security Commission**, appears by its attorney David T. Hopper; and the Defendant, **Betty L. Crisp**, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, **Adolph Crisp**, was served with process by a United States Deputy Marshal on June 28, 1995; that the Defendant, **Premium Processed Metals, Inc.**, was served with process by a United States Deputy Marshal on June 28, 1995; that the Defendant, **Herman A. Singer**, executed a Waiver of Service of Summons on April 17, 1995; that the Defendant, **Best Yet Foods**, executed a Waiver of Service of Summons on April 7, 1995; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, filed its entry of appearance on April 19, 1995; and that the Defendant, **General Property Management Co.**, was served with process by a United States Deputy Marshal on September 6, 1995.

The Court further finds that the Defendant, **Betty L. Crisp**, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 27, 1995, and continuing through December 1, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, **Betty L. Crisp**, and service cannot be made upon said Defendant within the

Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, **Betty L. Crisp**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Small Business Administration, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answers on April 13, 1995; that the Defendant, **Best Yet Foods**, filed its Answer on April 11, 1995 and its Answer to Amended Complaint on June 13, 1995; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, filed its Answer on April 19, 1995 and its Answer to Amended Complaint on June 2, 1995; that the Defendant, **Allparts U-Pull And Save, Inc.**, filed its Answer on April 20, 1995; that the Defendant, **State of Oklahoma ex rel. Oklahoma Employment Security Commission**, filed its Answer and Cross-Complaint on

July 19, 1995; and that the Defendant, **Betty L. Crisp**, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that on September 18, 1986, Adolph Crisp dba Premium Processed Metals, Inc. filed his voluntary petition in bankruptcy in Chapter 11 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 86-02395. On June 28, 1993, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order permitting the United States of America, on behalf of the Small Business Administration, to foreclose upon the subject real property, which order was clarified by order filed on March 16, 1995.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lots Eight (8), Nine (9), Ten (10), Eleven (11), Twelve (12), Thirteen (13) and the East Seventy-nine and one-half feet (79.5') of Lots Fifteen (15) and Sixteen (16), in Block Three (3), in ELM MOTTE ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat No. 931 thereof.**

The Court further finds that on August 21, 1975, Adolph Crisp, as President of Premium Processed Metals Company, executed and delivered to American State Bank his promissory note in the amount of $125,000.00, payable in monthly installments, with interest thereon at the rate of 10.25 percent per annum.

The Court further finds that as security for the payment of the above-described note, Adolph Crisp as President of Premium Processed Metals, Inc., executed and delivered

to American State Bank a real estate mortgage dated August 21, 1975, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on August 21, 1975, in Book 4178, Page 2216, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 21, 1975, Adolph Crisp and Betty L. Crisp executed and delivered to the United States of America, acting through the Small Business Administration, a Guaranty which further guaranteed payment of the above-described note.

The Court further finds that on November 30, 1984, American State Bank assigned the above-described mortgage to the U.S. Small Business Administration. This Assignment of Mortgage was recorded on February 5, 1986, in Book 4923, Page 60 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, **Adolph Crisp, Betty L. Crisp, and Premium Processed Metals, Inc.**, made default under the terms of the aforesaid note, mortgage and guaranty by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Adolph Crisp, Betty L. Crisp, and Premium Processed Metals, Inc.**, are indebted to the Plaintiff in the principal sum of $30,463.63 as of May 28, 1993, plus interest accruing thereafter at the rate of 10.25 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $379.38 ($8.40 fees for service of Summons and Complaint, $350.98 publication fees, $20.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, **Herman A. Singer**, claims no right, title or interest in the subject real property, having filed a Release of Mortgage on June 21, 1995, in Book 5722, Page 0711, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, **Best Yet Foods**, has liens on the property which is the subject matter of this action in the total amount of $6,774.46 as of May 9, 1995 ($277.00 for costs incurred; $5,641.46 for judgment and interest thereon; and $856.00 for attorney fees) by virtue of the following judgments.

Instrument	Dated	Recorded	Book Page	County State
Affidavit of Judgment Journal Entry of Judgment	06/14/90 07/20/84	07/03/90	5262 2082	Tulsa Oklahoma
Affidavit of Judgment Journal Entry of Judgment	06/14/90 03/09/89	07/03/90	5262 2084	Tulsa Oklahoma
Journal Entry of Judgment	03/09/89	03/05/92	5386 0388	Tulsa Oklahoma

The Court further finds that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, has a lien on the property which is the subject matter of this action in the amount of $96.07 together with interest and penalty according to law by virtue of Tax Warrant No. ITI9400577300 dated March 3, 1994 and recorded on March 7, 1994 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, **Allparts U-Pull And Save, Inc.**, has a lien on the property which is the subject matter of this action by virtue of a Notice of Interest pursuant to a lease agreement with Adolph Crisp dba Premium Process Metals, Inc., dated March 13, 1995, and recorded on March 13, 1995, in Book 5698, Page 2014 in the

records of Tulsa County, Oklahoma, but the Court finds that any and all leasehold rights will terminate upon confirmation of the sale of the subject real property.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $246.95, plus penalties and interest, for the years 1994 and 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, **General Property Management Co.**, has a lien on the property which is the subject matter of this action in the amount due and owing on a real estate mortgage, dated January 6, 1995, and recorded on January 6, 1995, in Book 5683, Page 1995 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, **State of Oklahoma ex rel. Oklahoma Employment Security Commission**, has a lien on the property which is the subject matter of this action in the amount of $3,015.42 together with lawful interest at the rate of 1 percent per month on the amount of tax due and owing from July 19, 1995 until paid, by virtue of Unemployment Compensation Tax Warrant No. 000205-95, dated January 9, 1995, and recorded January 26, 1995, in Book 5688, Page 2317 in the records of Tulsa County, Oklahoma.

The Court further finds that the Internal Revenue Service has liens upon the property by virtue of Notices of Federal Tax Liens described below.

Serial Number	Dated	Recorded	Book Page	County State
57050	11/01/85	11/12/85	4905 818	Tulsa Oklahoma
61387	03/19/86	03/24/86	4931 1746	Tulsa Oklahoma
61389	03/19/86	03/24/86	4931 1747	Tulsa Oklahoma
739109561	04/02/91	04/09/91	5313 2649	Tulsa Oklahoma
739301223	01/28/93	02/08/93	5475 1190	Tulsa Oklahoma
739310045	08/19/93	08/31/93	5537 2183	Tulsa Oklahoma

Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Internal Revenue Service is not made a party hereto; however, the liens will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Small Business Administration.

The Court further finds that the United States of America has an interest in the subject real property in the amount of $5,000.00 plus interest at the rate of 6.28 percent per annum pursuant to an Affidavit of Judgment recorded on May 12, 1995 in Book 5712, Page 1950 in the records of Tulsa County, Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Small Business Administration, have and recover judgment in rem against the Defendants, **Adolph Crisp and Premium Processed Metals, Inc., and Betty L. Crisp**, in the principal sum of $30,463.63 as of May 28, 1993, plus interest accruing thereafter at the rate of 10.25 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.60 percent per annum until paid, plus the costs of this action in the amount of $379.38 ($8.40 fees for service of

Summons and Complaint, $350.98 publication fees, $20.00 fee for recording Notices of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Herman A. Singer**, has no right, title or interest in the subject real property, having filed a Release of Mortgage on June 21, 1995, in Book 5722, Page 0711, in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Best Yet Foods**, have and recover judgment in the total amount of $6,774.46 as of May 9, 1995 plus interest until paid ($277.00 for costs incurred; $5,641.46 for judgment and interest thereon; and $856.00 for attorney fees) by virtue of the above-described judgments.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma** ex rel. **Oklahoma Tax Commission**, have and recover judgment in rem in the amount of $96.07 together with interest and penalty according to law by virtue of Tax Warrant No. ITI9400577300 dated March 3, 1994 and recorded on March 7, 1994 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any and all leasehold rights now held by the Defendant, **Allparts U-Pull And Save, Inc.**, will terminate upon confirmation of the sale of the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the

amount of $246.95, plus penalties and interest, for ad valorem taxes for the years 1994 and 1995. Said lien is superior to the interest of the Plaintiff, United States of America.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, has no right, title or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **General Property Management Co.**, have and recover judgment for the amount due and owing on a real estate mortgage, dated January 6, 1995, and recorded on January 6, 1995, in Book 5683, Page 1995 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel. Oklahoma Employment Security Commission**, have and recover judgment in the amount of $3,015.42 together with lawful interest at the rate of 1 percent per month on the amount of tax due and owing from July 19, 1995 until paid, by virtue of Unemployment Compensation Tax Warrant No. 000205-95, dated January 9, 1995, and recorded January 26, 1995, in Book 5688, Page 2317 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the United States of America have and recover judgment in the amount of $5,000.00 plus interest at the rate of 6.28 percent per annum pursuant to an Affidavit of Judgment recorded on May 12, 1995 in Book 5712, Page 1950 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, **Adolph Crisp, Betty L. Crisp, and Premium Processed Metals, Inc.**, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the

United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma;

Third:
In payment of the judgment rendered herein in favor of the Plaintiff, Small Business Administration;

Fourth:
In payment of the judgment rendered herein in favor of the Defendant, Best Yet Foods;

Fifth:
In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission;

Sixth:
In payment of the judgment rendered herein in favor of the Defendant, General Property Management Co.;

Seventh:
In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Oklahoma Employment Security Commission;

Eighth:
In payment of the judgment rendered herein in favor of the United States of America (by virtue of the above-described Abstract of Judgment).

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

APPROVED:

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Wyn Dee Baker

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Judgment of Foreclosure
Case No. 95-C-269-H (Crisp)

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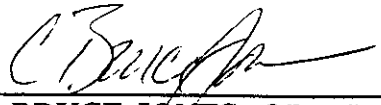

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Judgment of Foreclosure
Case No. 95-C-269-H (Crisp)

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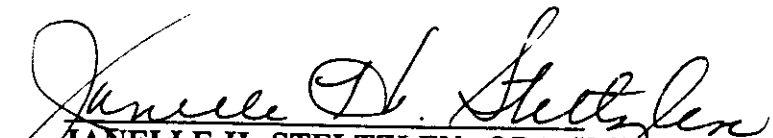

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Judgment of Foreclosure
Case No. 95-C-269-H (Crisp)

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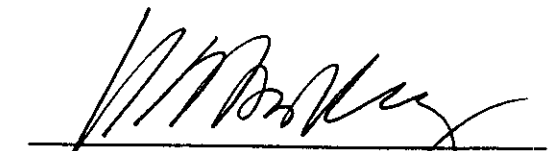

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Judgment of Foreclosure
Case No. 95-C-269-H (Crisp)

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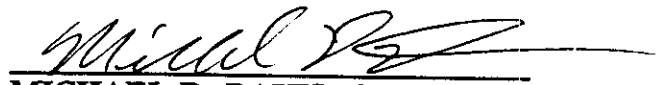

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Judgment of Foreclosure
Case No. 95-C-269-H (Crisp)

WDB:cas

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Judgment of Foreclosure
Case No. 95-C-269-H (Crisp)

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Judgment of Foreclosure
Case No. 95-C-269-H (Crisp)

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Judgment of Foreclosure
Case No. 95-C-269-H (Crisp)

WDB:css

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE E. PRYOR,

Plaintiff,

vs. No. 96-CV-301-H

OKLAHOMA DEPARTMENT OF CORRECTIONS,

Defendant.

ORDER

On April 17, 1996, George E. Pryor, a state inmate, filed a motion for leave to proceed in forma pauperis along with a civil rights complaint pursuant to 42 U.S.C. § 1983. The Court now reviews Plaintiff's complaint under 28 U.S.C. § 1915(d) as amended by the Prison Litigation Reform Act of 1996.

Plaintiff alleges that employees of the Tulsa Community Corrections Center (TCCC) refused to permit his designated recipients to take possession of his personal effects and funds and, instead, donated his personal property to the Salvation Army without his consent. Plaintiff seeks $4,250 in damages.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v.

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Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

Even liberally construing Plaintiff's complaint to allege a negligent or an intentional deprivation of his personal property, his allegations lack an arguable basis in law. The Supreme Court has held that "[a]n unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post deprivation remedy is available." Hudson v. Palmer, 468 U.S. 517, 533 (1984); see also Parratt v. Taylor, 451 U.S. 527 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327 (1986); Freeman v. Department of Corrections, 949 F.2d 360, 362 (10th Cir. 1991). But see Abbott v. McCotter, 13 F.3d 1439, 1443 n.3 (10th Cir. 1994) (Hudson and Parratt do not apply when the alleged property loss is not "random and unauthorized" but pursuant to an "affirmatively established or de facto policy, procedure, or custom).

Plaintiff has an adequate state post-deprivation remedy under Okla. Stat. tit. 51, § 151-55. See Hudson, 468 U.S. at 533. Therefore, he cannot allege a due process claim under section 1983.

Moreover, in order to state a claim under section 1983, Plaintiff must allege that a person, acting under color of state

law, deprived him of a constitutional right. West v. Atkins, 487 U.S. 42 (1988). Since neither the Oklahoma Department of Corrections nor the TCCC is a person under section 1983, they cannot be sued under section 1983.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis is GRANTED and this action is hereby DISMISSED WITHOUT PREJUDICE as frivolous. The Clerk shall MAIL to Plaintiff a copy of the complaint.

IT IS SO ORDERED this 21st day of May, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOU ELLA SEYMORE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 94-C-95-H
	)	
SHAWVER & SONS, INC.,	)	
	)	
Defendant.	)	

ORDER

This matter comes before the Court on the basis of authorities set forth in Defendant's trial and supplemental authorities provided by Plaintiff on the issue of the Court's subject matter jurisdiction over Plaintiff's retaliation claim.

It is settled law that a court is required "of its own motion, to deny its jurisdiction . . . in all cases where such jurisdiction does not affirmatively appear in the record." Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995). It is also well established that a Title VII plaintiff must exhaust all administrative remedies before bringing a claim in federal court. In the instant case, it is undisputed that Plaintiff failed to allege retaliation in her EEOC complaint. Thus, Plaintiff may only bring the retaliation claim if it is "reasonably related" to the discrimination and harassment claims set forth in her EEOC complaint. Brown v. Harshorne Public School Dist. No. 1, 864 F.2d 680, 682 (10th Cir. 1988).

The Court finds the reasoning of Mass v. Martin Marietta Corp., 805 F. Supp. 1530 (D. Colo. 1992), to be persuasive in applying the Brown standard to the instant case. In Mass, the United States District Court for the District of Colorado held that charges of racial discrimination and

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harassment in the plaintiff's EEOC complaint were not reasonably related to the retaliation claim the plaintiff attempted to bring pursuant to Title VII. The Mass court noted:

> In testing whether a claim is reasonably related to the charge, the court looks at the investigation that can reasonably be expected to grow out of the underlying charge. . . . Although an investigation of charges based on racial discrimination and harassment might include an investigation of any claims based on retaliation, such an investigation cannot reasonably be expected to include an investigation of retaliation claims.
>
> There is a recognized distinction between claims based on retaliation and claims based on discrimination. Courts have held that a retaliation claim is reasonably related to the original charge when the retaliatory acts occur after the charge is filed. For example, a claim that defendant retaliated after plaintiff filed the EEOC charge would be regarded as reasonably related to the charge itself. Such a rule makes sense: plaintiff could not have included the retaliation claim in the original charge, since the retaliatory acts had not yet occurred. This rationale does not apply when the retaliatory acts occurred before the charge was filed. Several courts have concluded that a retaliation claim is not reasonably related to a discrimination claim when the allegedly retaliatory acts occurred prior to filing the charge.

Id. at 1541 (citations omitted). The Court agrees with the Mass court and the other courts cited therein. Because Plaintiff failed to assert retaliation in her EEOC claim, the Court is without subject matter jurisdiction to entertain her retaliation claim.

Accordingly, partial summary judgment in favor of Defendant is hereby granted on Plaintiff's retaliation claim.

IT IS SO ORDERED.

This 22nd day of May, 1996.

Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOANNA SIMPSON,

Plaintiff,

v.

JESSE BROWN, Secretary of the Veterans Administration,

Defendant.

Case No. 95-C-805-H

ORDER

This matter comes on before the Court upon the stipulation of all parties and the Court being fully advised in the premises ORDERS, ADJUDGES and DECREES, that all claims asserted herein by the plaintiff, Joanna Simpson, against the United States of America are hereby dismissed with prejudice.

DATED this 21st day of May 1996.

S/ SVEN ERIK HOLMES

SVEN ERIK HOLMES
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JIMMIE DALE BARRETT,)
)
Plaintiff,)
)
vs.) No. 95-C-1230-H
)
TULSA COUNTY JAIL, et al.,)
)
Defendants.)

ORDER

This matter comes before the court on Defendants' Third Application for Enlargement of Time within which to file a special report, answer and/or dispositive motion (docket #11) and Plaintiff's failure to notify the Court of his new address. On April 15, 1996, Plaintiff's mail was returned to the Court with the notation that Plaintiff was no longer in custody.

Accordingly, this action is hereby DISMISSED for lack of prosecution. Defendants' motion for enlargement of time (docket #11) is DENIED as moot.

IT IS SO ORDERED.

This 21st day of May, 1996.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHELLEY SEALS,

Plaintiff,

v.

OIL DATA, INC., a Texas corporation; JIM HEDINGER, an individual and in his capacity as office manager,

Defendants.

Case No. 95-CV-511-H

ORDER

This matter comes before the Court on the motion for summary judgment of Defendants Oil Data, Inc. ("Oil Data") and Jim Hedinger (Docket # 21). Plaintiff has asserted claims against Oil Data for sexual harassment, intentional infliction of emotional distress, and negligence. Against Hedinger, Plaintiff's remaining claim is for negligence. Defendants move for summary judgment on all of Plaintiff's claims arguing that (1) Plaintiff's sexual harassment claim is time-barred in whole or in part; (2) Plaintiff has not adduced sufficient evidence to prove a prima facie case of sexual harassment; (3) Defendants' prompt remedial action bars any sexual harassment claim; (4) Plaintiff has failed to make out a claim for either intentional infliction of emotional distress or negligence; and (5) Plaintiff's negligence claim is barred by the doctrine of exclusive remedy.

I.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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> [t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

II.

In the charge and affidavit filed with the EEOC, Ms. Seals complained of harassment by a male co-worker, Hiep Huynh, in the Fall of 1992. Ms. Seals alleged that he ultimately threatened to kill both her and himself if she did not comply with his desire to pursue a romantic relationship and that he made that threat both on and off the job site. The situation culminated with Ms. Seals filing a police report on October 30, 1992 and filing a petition for a protective order on November 5, 1992, charging Huynh with harassment and stalking. Additionally, Ms. Seals alleged that another male co-worker, Troy Mackie, sexually assaulted her in the Fall of 1992. Ms. Seals alleged that Mackie's employment in her office continued until approximately April 1994 and that he continued to "pester and annoy" other women employees in the office through that time. Ms. Seals alleged that she felt continually threatened by his presence and suffered a reduction in overtime wages as a result.[1]

Under Title VII, to be timely filed, a charge of discrimination must be filed with the Equal Employment Opportunity Commission ("EEOC") within 300 days of the alleged discriminatory treatment. 42 U.S.C. § 2000e-5(e). In November 1994, Plaintiff filed a charge of discrimination with the EEOC. She was issued a right to sue notice on May 30, 1995. She commenced this action on June 6, 1995, within 90 days after receipt of the right to sue notice. Oil Data argues that the alleged discriminatory acts complained of by Plaintiff are time-barred because she failed to file her charge of discrimination within the required time period of 300 days from the date of the alleged acts.

In response, Plaintiff attempts to establish the "continuing violation" exception to the Title VII filing deadlines by asserting that she was subject to continuing hostile work environment

[1] In a supplemental affidavit, Ms. Seals states that, when she reviewed her pay stubs for the period in question (November 1992 through April 1994), she discovered that her overtime pay had, in fact, remained approximately the same.

sexual harassment as evidenced by these four incidents encompassed in her claim within the 300-day period:

> 1. In February or March, 1994, Mackie grabbed Terry Wilson's breast, which Shelley learned of when she found Terry sobbing in the break room.[2]
>
> 2. Sometime after the Terry Wilson incident, Mackie terrified Shelley by grabbing her around the waist on the loading dock.[3]

---

[2] Although this incident is not in her summary of claim submitted to the EEOC, Plaintiff's evidence in support of these facts is found in the Wilson Affidavit and Seals deposition testimony.

[3] Likewise, this incident is not in Plaintiff's EEOC summary of claim. Plaintiff cites to the deposition testimony of Isidro M. Rey, a co-worker of Plaintiff, and to the Affidavit of Shelley Seals, made April 2, 1996, in support of these facts. Mr. Rey's deposition describes the incident; however, he does not testify that the incident took place in 1994. Significantly, Plaintiff does not cite to her own deposition testimony in support of these facts but rather she merely alleges the occurrence of this incident in an affidavit submitted in support of her response to Defendants' motion for summary judgment.

Defendants object to the Court's consideration of this affidavit in connection with the instant summary judgment motion as an impermissible attempt to create a sham fact issue. See Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986). In Franks, Plaintiff supported a motion seeking reconsideration of an earlier summary judgment ruling with an affidavit that was directly contrary to earlier deposition testimony. The Tenth Circuit stated:

> [i]n assessing a conflict under these circumstances, however, courts will disregard a contrary affidavit when they conclude that it constitutes an attempt to create a sham fact issue. See, e.g., Foster v. Arcata Associates, Inc., 772 F.2d 1453, 1462 (9th Cir. 1985), cert. denied, 106 S. Ct. 1267 (1986); Biechele v. Cedar Point, Inc., 747 F.2d 209, 215 (6th Cir. 1984); Van T. Junkins & Associates, Inc. v. U.S. Industries, Inc., 736 F.2d 656, 657-58 (11th Cir. 1984); Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1364 (8th Cir. 1983); Perma Research & Development Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969). Underlying those decisions is the conclusion that the utility of summary judgment as a procedure for screening out sham fact issues would be greatly undermined if a party could create an issue of fact merely by submitting an affidavit contradicting his own prior testimony.
>
> Factors relevant to the existence of a sham fact issue include whether the affiant was cross-examined during his earlier testimony, whether the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain. [citations omitted].

Franks, 796 F.2d at 1237. In the instant case, while the Court views the materialization at the summary judgment stage of a new alleged incident of discriminatory treatment within the key time frame with suspicion, because the testimony of Mr. Rey supports Plaintiff's statement of the incident (if not her placement of the timing of the incident), the Court will consider this incident

3. July 8, 1994, Mackie resigns from ODI.

4. October, 1994, Hedinger offers Shelley opportunity to continue her employment with ODI in Houston, which she declines when Hedinger will not discuss with her whether she would be exposed to the stalker Hiep.[4]

Plaintiff's Objection to Defendants' Motion for Summary Judgment at 16.

"To invoke the continuing violation exception to the Title VII charge-filing deadlines, [Plaintiff] must show either (1) a series of related acts taken against a single individual, one or more of which falls within the limitations period, or (2) the maintenance of a company-wide policy of discrimination both before and during the limitations period." Purrington v. Univ. of Utah, 996 F.2d 1025, 1028 (10th Cir. 1993) (citation omitted). In the instant case, no evidence exists to demonstrate a company-wide policy of discrimination. Thus, to prevail on the statute of limitations issue, Plaintiff must at least raise a material question of fact as to whether Oil Data "engaged in a series of related discriminatory acts, at least one of which falls within the limitations period." Mascheroni v. Board of Regents of Univ. of California, 28 F.3d 1554, 1561 (10th Cir. 1994).[5]

The third incident alleged by Plaintiff under the continuing violation exception is Mackie's resignation from Oil Data. While "[t]he discriminatory act occurring within the time period need not constitute a legally sufficient Title VII claim in itself", id., Mackie's departure from Oil Data is not a "discriminatory act". At most, it might raise an inference that the alleged harassing acts of Mackie occurring "outside the required time limit had a continuing effect within the statutory time allowed for suit." Id. This is not sufficient to invoke the continuing violation exception.

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for purposes of the continuing violation analysis.

[4] Plaintiff does not allege that her termination at Oil Data was discriminatory.

[5] "The continuing violation doctrine is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated." Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1415 n.6 (10th Cir. 1993).

Likewise, the fourth incident alleged by Plaintiff fails to establish the continuing violation exception. Assuming that Plaintiff's allegation is true, a conversation with a supervisor, wherein that supervisor refuses to discuss the current job responsibilities of one of Plaintiff's former co-workers, about whom Plaintiff had filed a police complaint, is not a "discriminatory act".

As to the remaining two incidents alleged by Plaintiff to have occurred within the statute of limitations, the Court employs a three-factor inquiry to determine whether the alleged incidents of discrimination constitute a continuing violation or are merely discrete unrelated acts. Id. The three factors consist of:

> (i) subject matter -- whether the violations constitute the same type of discrimination; (ii) frequency; and (iii) permanence -- whether the nature of the violations should trigger an employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate.

Id.

Plaintiff's amended complaint alleged the creation and maintenance of a hostile work environment. She advances two principal categories of discriminatory treatment: (1) the receipt of death threats from a co-worker after she had rejected his sexual advances; and (2) offensive fondling and touching by another co-worker. The first of these allegedly discriminatory acts occurred outside the statutory time period. With the exception of the alleged "grabbing" of Plaintiff around her waist on the loading dock, the second allegedly discriminatory behavior occurred outside the statutory time period as well.

With respect to the factors enumerated above, the first incident, the alleged grabbing of Terry Wilson's breast, involves sexual harassment, though not with respect to the Plaintiff. Certainly, this incident, if true, is some evidence to demonstrate an ongoing hostile work environment. The issue is whether, when coupled with the second incident alleged by Plaintiff,

the grabbing of her waist by Mackie, these two actions establish a continuing violation such that the Court should toll the Title VII statute of limitations for equitable purposes.[6]

Plaintiff points the Court to two cases wherein the continuing violation exception was found: Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410 (10th Cir. 1993) and Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989). However, the facts of both of these cases, including the incidents occurring within the time period, are vastly different from the facts and circumstances of the instant case.[7] There are more incidents within the statutory time period,

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[6] At the hearing on the summary judgment motion, Plaintiff's counsel represented that Mr. Mackie continually threatened and harassed Plaintiff during his tenure at Oil Data. On that basis, Plaintiff's counsel asserts that the continuing violation exception applies. Nowhere in the record has Plaintiff pointed to a single incident of threatening or harassing conduct during the statute of limitations time period other than the two incidents mentioned above. Plaintiff's counsel further argued that Plaintiff's fear of Mr. Mackie caused her to alter her work patterns during 1994. While this may be true, Plaintiff's subjective alteration of her own work patterns during the time period at issue does not rise to the level of an act taken against her by her employer. Without that nexus, Plaintiff may not toll the statute of limitations.

[7] In Martin, Plaintiff alleged the following in support of her claim of sexual harassment:

> [t]hroughout her employment Martin was the target of inappropriate behavior. IN the Summer of 1988, Gudgel asked Martin to accompany him to a convention in Colorado. She agreed but made it clear that as a condition to her attending the conference, she must have her own hotel room. when they arrived at the convention, she was told that the hotel did not have a separate room and she was forced to share a suite with Gudgel.
>
> In October of 1988, while at another convention in Tulsa, Oklahoma, Martin was propositioned for sex by one of Gudgel's clients which she refused. The next day Gudgel came to Martin's hotel room and she told him about the incident. Gudgel scolded her and told her that having sex with the client would not have hurt anything and that no one would have known. In the course of their conversation, Gudgel propositioned Martin for sex. She refused and an argument ensued. Gudgel then raped Martin. She did not report this incident to anyone.
>
> In December of 1988, Gudgel drove Martin home from work after they had finished working for the day. Gudgel went into Martin's house, placed his hands on her shoulder and requested that she accompany him to Lawton, Oklahoma, for the night. She refused, saying that she did not mess around with people with whom she worked. He explained that "he was the owner and not [her] supervisor there was nothing [she] could do." EEOC Affidavit at 2.
>
> In May of 1990, Gudgel inquired of Martin whether she had informed anyone of the rape

that had occurred in October of 1988. Martin informed Gudgel that she had told no one. At the same time Gudgel asked Martin out on a date, which she refused. Martin felt intimidated by these exchanges.

In addition to Gudgel, several of Gudgel's employees also harassed Martin. Beginning in February of 1989, and continuing thereafter, Martin was harassed by her supervisor, Lonnie Rothner. On one occasion, when picking Martin up at her house, Rothner showed her some lingerie and offered it to her if she would model it. Martin refused. During a drive to a convention in Tulsa, Rothner waved an artificial penis at Martin and placed it in his belt in front of her. Finally, while at the same convention, Rothner obtained a key to Martin's hotel room from the front desk, entered without her permission, and solicited sex which martin declined.

In July of 1989, Martin was promoted to an officer of one of Gudgel's companies, Nannie and the Newborns (N & N). While an officer of N & N, Martin was subjected to repeated sexual innuendoes and embarrassing remarks from one of her co-employees, Max Clark. These remarks continued as long as she was employed there.

3 F.3d at 1412-13.

In Waltman, Plaintiff alleged the following:

[t]he first instance of sexual harassment occurred in the Spring of 1982 when an IPCO employee several times broadcast obscenities directed toward Waltman over the public address system. In response, other employees began making suggestive comments to Waltman. Waltman complained to her supervisor who said he would "take care of it." A foreman told the employee who had broadcast the obscenities to stop. The employee was not punished and no note regarding the incident was placed in his employment file.

In September of 1982, IPCO moved Waltman to the "A" shift. While on the A shift, Waltman's supervisor, Garrett, and his assistant urged Waltman to have sex with a co-worker. On several occasions, Garrett touched Waltman in an offensive manner -- pinched her buttocks with pliers and tried to put his hands in her back pockets. IN addition, Garrett and fellow employees often made sexually suggestive comments to Waltman, for example "I would like a piece of that," referring to Waltman.

During her tenure on the A shift, Waltman received over thirty pornographic notes in her locker. Sexually explicit pictures and graffiti were drawn on the walls of the powerhouse, on the restroom walls and in the elevator. Some of these drawing were directed at Waltman. Employees had sexually oriented calendars on the walls and in their lockers which were kept open. They also hung used tampons from their lockers. On more than one occasion, co-workers propositioned Waltman

In October of 1983, Waltman reported the incidents recited above to Pardue, one of the IPCO managers. Pardue allegedly told her she should expect this type of behavior working with men. Pardue claims he spoke with Waltman's supervisor, Garrett, who was one of the men who had been harassing Waltman, about Waltman's complaints and told Garrett to inform his shift that this behavior was not acceptable. Garrett stated that

the incidents within the time period are more directly related to the conduct complained of outside of the time period, the incidents within the time period happened to the Plaintiff herself, and the incidents within the time period are more clearly instances of sexual harassment. In Martin, the court noted that the following incidents of harassment occurred within the 300-day time frame: "offensive comments by Clark, her termination, as well as Gudgel's questioning concerning the rape at the same time that he asked Martin for a date." 3 F.3d at 1415. In Waltman, the following incidents occurred within the statute of limitations: an employee pinched Plaintiff's breasts, a co-worker grabbed her thigh, fellow workers constantly directed lewd and suggestive comments toward her, she became ill as a result of the sexual harassment and took sick leave, she contacted her supervisor as to all the incidents of sexual harassment, her supervisor in turn spoke with his superiors several times about the allegations, the company failed to take any steps to remove or prohibit pornographic graffiti around the mill, sexual remarks about other women were

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> Pardue never told him that Waltman had accused him of inappropriate touching and sexual comments. Garrett also could not recall Pardue ever instructing him to tell his crew to stop the harassment. Pardue did not discipline anyone nor did he investigate Waltman's claims. Rather, Pardue transferred Waltman to another shift.
>
> During the summer of 1984, an IPCO employee told a truck driver that Waltman was a whore and that she would get hurt if she did not keep her mouth shut. Later, in the Fall of 1984, several other incidents occurred. A Brown and Root employee, who was working at the mill, grabbed Waltman's arms while she was carrying a vial of hot liquid; another Brown and Root worker then stuck his tongue in her ear. In a separate incident, an IPCO employee told Waltman he would cut off her breast and shove it down her throat. The same employee later dangled Waltman over a stairwell, more than thirty feet from the floor. In November 1984, one employee pinched Waltman's breasts. In another incident, a co-worker grabbed Waltman's thigh.
>
> In addition to the specific incidents recited above, Waltman's fellow workers constantly directed lewd and suggestive comments toward her. Waltman estimated that eighty percent of the men in the powerhouse made sexually suggestive comments to her at some point. She also testified that a week did not go by without a co-worker directing a sexual comment at her.

875 F.2d at 470-72.

made, another employee grabbed her breasts and directed a high pressure hose at her crotch, and Plaintiff finally resigned. 875 F.2d at 471-73.

In light of the three factors of subject matter, frequency, and permanence, Plaintiff's two alleged incidents within the statute of limitations in the instant case do not establish a continuing violation such that this Court may equitably toll the statute of limitations. Cf. Purrington, 996 F.2d at 1029 ("The district court indicated that '[o]bserving one act of alleged harassment, and hearing about another, both of which occurred about a year after the alleged harassment of plaintiff ceased, does not rise to the level of a 'dogged pattern' of discrimination.' We agree. The two incidents Purrington cites are not related closely enough to evidence a dogged pattern of discrimination and thereby constitute a continuing violation."). Oil Data's motion for summary judgment on Plaintiff's Title VII claim is hereby granted.

III.

The remaining claims, intentional infliction of emotional distress and negligence against Oil Data and negligence against Mr. Hedinger, are pendent state law claims. Pendent jurisdiction is "a doctrine of discretion, not of plaintiff's rights." United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966). The Gibbs Court believed that although the Court has the constitutional authority to adjudicate the pendent claims, "if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." Id. Accordingly, because judgment as matter of law is mandated on Plaintiff's Title VII claim, the Court will exercise its discretion to dismiss the pendent state law claims.

IV.

In conclusion, Defendants' motion for summary judgment (Docket # 21) on Plaintiff's Title VII claim is granted. The Court dismisses the remaining pendent state law claims.

IT IS SO ORDERED.

This 22ND day of May, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONNELL HANEY,

Plaintiff,

vs.

ROBERT JOHNSON, and STANLEY GLANZ,

Defendant.

No. 96-CV-335-C

ORDER

On April 24, 1996, Ronnel Haney, a Tulsa County inmate, filed a motion for leave to proceed in forma pauperis along with a civil rights complaint pursuant to 42 U.S.C. § 1983. The Court now reviews Plaintiff's complaint under 28 U.S.C. § 1915(d), as amended by the Prison Litigation Reform Act of 1996.

Plaintiff alleges that Officer Robert Johnson used excessive force in violation of his constitutional rights after Plaintiff reminded him he should not come to work with alcohol on his breath. Plaintiff alleges that Officer Johnson twice grabbed him and once pushed him into the bars hurting his hand, arm and back. Plaintiff seeks $50,000 in damages for pain and suffering and an order directing that all charges against him be dismissed.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28

U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

Even liberally construing Plaintiff's complaint, in accordance with his pro se status, his allegations lack an arguable basis in law. While the conduct alleged in Plaintiff's complaint is unfortunate, and potentially illegal under state law, it does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. In fact, de minimis applications of force are excluded from the Eighth Amendment's cruel and unusual punishment calculation. Hudson v. McMillian, 112 S.Ct. 995, 1000 (1992); see also Sampley v. Ruettgers, 704 F.2d 491, 494 (10th Cir. 1983); El'Amin v. Pearce, 750 F.2d 829 (10th Cir. 1984).

Accordingly, Plaintiff's motion for leave to proceed in forma pauperis is GRANTED and this action is hereby DISMISSED WITHOUT PREJUDICE as frivolous. The Clerk shall MAIL to Plaintiff a copy of the complaint.

IT IS SO ORDERED this 21st day of May, 1996.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ZELMA GOSSETT,

Plaintiff,

vs.

HARSCO CORPORATION,

Defendant.

Case No. 95-C-793-C

ORDER

Before the Court is the motion for summary judgment filed by the defendant, Harsco Corporation. Defendant asserts that it is entitled to summary judgment as a matter of law in that plaintiff's common law claim for wrongful discharge based on sex discrimination is barred by (1) a recent decision of the Oklahoma Supreme Court, (2) the running of the statute of limitations, (3) plaintiff's personal bankruptcy proceeding, and (4) failure to establish gender based discrimination.

In February 1991, plaintiff Zelma Gossett was hired by Harsco at its Port of Catoosa facility, known as Air-X-Changers. Plaintiff was placed in a newly created position called Material Control Analyst. Plaintiff's job consisted of expediting the movement of production materials through the shop by the use and improvement of a new computer production control system called "ASK.MANMAN." Plaintiff had experience with the ASK.MANMAN system prior to her employment with Air-X-Changers. Plaintiff's immediate supervisor at Air-X-Changers was Gary Raasch, who had been a friend of plaintiff's prior to her employment.

In January 1992, defendant laid off the plaintiff by notifying her that management

was predicting a downturn in business. Plaintiff was advised that she was one of the first to be laid off as part of an overall reduction in work force. By November 1992, the defendant had laid off a total of 92 employees, twenty-five percent in office personnel and forty percent in shop personnel.

Plaintiff asserts that she was wrongfully terminated by the defendant. Regardless of the work force reduction, plaintiff asserts that she was selected to be laid off because of management's expression that it did not want a woman in the production shop, which employed all male workers. Plaintiff provides several instances and statements allegedly made by management which, if proven, could establish a hostile environment and gender based discrimination. Specifically plaintiff asserts that Bob Rothenbucher, who was in charge of the production shop, allegedly told the shop foreman to keep plaintiff out of the shop because she was female, and her presence disrupted productivity. During a staff meeting, plaintiff asserts that Mr. Rothenbucher belittled and berated her in front of other workers when she was attempting to make a presentation at the meeting on behalf of her male supervisor, Mr. Raasch. Rothenbucher allegedly stared at plaintiff's breasts and made non-work related sexist comments about her attire. Plaintiff further contends that her supervisor Mr. Raasch, allowed his desire to have a personal relationship with plaintiff to interfere with their work relationship. Plaintiff contends that her rejection of Mr. Raasch's request had an adverse impact on her ability to effectively perform her job.

Plaintiff contends that she was qualified for her job and that during her brief tenure with the company her work resulted in the production department being operated in a fiscally efficient manner. Plaintiff further asserts that she was laid off even though she

was more qualified than a male employee in her department who was retained by the defendant and transferred to another position.

Defendant contends that the Oklahoma Supreme Court's holding in List v. Anchor Paint Manuf.Co., 770 P.2d 1011 (Okla.1996) requires the district court to dismiss a common law action for wrongful discharge when statutory remedies are available and adequate. Defendant asserts that because plaintiff has adequate remedies under both the state and federal statutory scheme for alleged sex discrimination that she is precluded from recovering under the common law. The Court disagrees. Under List, a claim under common law for wrongful discharge based on sex discrimination is only precluded if the state statutory remedies are the same or greater than those provided by common law. In this instance, plaintiff's remedies under the common law are greater than those provided under the Oklahoma statute and thus the state statutory remedies do not preclude recovery under the common law. See, Burk v. K-Mart Corporation, 770 P.2d 24 (Okla.1989), Tate v. Browning-Ferris, Inc, 833 P.2d 1218 (Okla.1992) and List v. Anchor Paint Manuf.Co., supra.

Defendant asserts that plaintiff's claim is precluded by expiration of the two year statute of limitations. Defendant contends that plaintiff was aware or should have been aware that she would be terminated prior to the date that defendant officially notified plaintiff of her termination. However, for limitation purposes, the Court looks to dates in which there is a continuation of specific acts of discrimination, rather than the first date in which plaintiff suspected that she was subject to discriminatory treatment. See, Manders v. Oklahoma ex.rel.Dept. of Mental Health, 875 F.2d 263 (10th Cir.1989). Plaintiff asserts

that she was wrongfully terminated by the defendant on January 10, 1992. Plaintiff filed this action on January 10, 1994, which was within the two year limitation period and thus her action is not time barred.

Defendant further states that plaintiff's action should be barred or limited by certain events occurring in her personal bankruptcy proceeding. Whether plaintiff's recovery of damages is barred or limited by a collateral proceeding is a legal issue which should be addressed in the appropriate forum in the event plaintiff prevails on her claims asserted herein. Such a potential limitation on damages recoverable is not an issue for summary judgment purposes as to the merits of the claims raised by plaintiff. The Court defers consideration of the effect, if any, of the final order entered in plaintiff's personal bankruptcy proceedings and grants the defendant leave to reassert its position, if appropriate, at the conclusion of trial.

Defendant requests summary judgment by asserting there is no genuine issue of fact that plaintiff was laid off as part of the defendant's legitimate plant-wide reduction in work force. However, the pleadings indicate that plaintiff does dispute this fact. Plaintiff contends that the motivating factor in terminating her employment, was her gender. Plaintiff also asserts that she was terminated even though she was more qualified than a male employee who was retained and transferred to another position. Plaintiff asserts that her employment record should have qualified her for a similar transfer of position, rather than termination. Whether plaintiff can meet her burden of proof as to these allegations is not a matter the Court will summarily consider, prior to plaintiff's presentation of evidence.

Accordingly, defendant's motion for summary judgment is denied. The parties are ordered to file their joint pre-trial order by 10:00 A.M., May 28, 1996. The pretrial conference is hereby set for May 29, 1996 at 2:00 P.M.

IT IS SO ORDERED this 22nd day of May, 1996.

H. DALE COOK
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 22 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY BIG ELK and SAM McCLANE)
)
Plaintiffs,)
)
VS.) Case No. 96-C-87
)
DONNA KASTNING, et al.,)
)
Defendants.)

ENTERED ON DOCKET
DATE MAY 23 1996

ORDER

The Court has for consideration Defendant Larry Stuart's ("Stuart") Motion to Dismiss Stuart in his official capacity. (Docket #10).

Based on the agreement of Plaintiffs, Stuart's Motion is hereby GRANTED and Larry Stuart is hereby dismissed as a Defendant in his official capacity.

IT IS SO ORDERED THIS 22nd DAY OF MAY, 1996.

THOMAS R. BRETT
CHIEF JUDGE, U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LARRY GARNER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 96-C-296-K**
	)	
PHILIP MORRIS INCORPORATED,	)	
	)	
Defendant.	)	

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Larry Garner, by and through his attorneys of record, The Richardson Law Firm, by Chadwick R. Richardson, and hereby dismisses this cause of action against the Defendant, *with prejudice* to future filings.

Respectfully submitted,

THE RICHARDSON LAW FIRM

By: Chadwick R. Richardson
Chadwick R. Richardson, OBA #15589

Autumn Oaks Building
6846 South Canton, Suite 200
Tulsa, Oklahoma 74136-3414
Telephone: (918) 492-7674
Facsimile: (918) 493-1925

ATTORNEYS FOR PLAINTIFF

Certificate of Mailing

I hereby certify that on the 21 day of May, 1996, I mailed a true and correct copy of the above and foregoing instrument, with proper postage prepaid thereon, to:

David R. Cordell
CONNER & WINTERS
2400 First Place Tower
15 E. Fifth St.
Tulsa, OK 74103-4391

Chadwick R. Richardson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAXINE P. SWARTZ individually and as personal representative of the ESTATE OF ELBERT DURAN SWARTZ,

Plaintiff,

v.

CHANDLER, FRATES & REITZ, INC.; and KEYPORT SELF-STORAGE MEMPHIS I, an Oklahoma partnership,

Defendants.

Case No. 94-C-1143BU

ORDER

The Court, being advised that all of the issues between the parties have been resolved and that there is no further issues for this Court to decide, the above case is ordered dismissed with prejudice to the future filing thereon.

UNITED STATES DISTRICT JUDGE

APPROVED:

GREGORY K. FRIZZELL, OBA #11089
CityPlex Tower
2448 East 81st Street, Suite 4755
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(918) 492-7995
ATTORNEY FOR THE PLAINTIFF

WILLIAM J. BERGNER, OBA #728
301 N.W. 63rd Street, Suite 400
Oklahoma City, OK 73116
(405) 843-8855
ATTORNEY FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT FOR
FOR THE NORTHERN DISTRICT STATE OF OKLAHOMA

KATHY KEIM,

Plaintiff,

v.

ROCKY BEVARD; TIM SHIVLEY; CITY OF BARTLESVILLE, OKLAHOMA; CITY OF COFFEYVILLE, KANSAS; BARTLESVILLE POLICE OFFICERS JOHN DOE, ET AL.; COFFEYVILLE POLICE OFFICERS RICHARD ROE, ET AL.

Defendants.

Case No: 96 CV 0016 BU

ENTERED ON DOCKET

DATE MAY 22 1996

FILED

MAY 21 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOURNAL ENTRY OF DISMISSAL WITH PREJUDICE

NOW, on this 20 day of May, 1996, this matter comes before the Court for dismissal of all claims. Plaintiff appears by her attorney, Jeff A. Nix of Nix & Rinn. Defendants, City of Coffeyville, Kansas and Coffeyville Police Officers Richard Roe, appear by their attorney, Pamela A. McLemore of Morrison & Hecker L.L.P. There are no other appearances.

The Court is advised that the parties have reached a settlement which fully and finally resolves all claims existing between them. The parties request that the Court dismiss all claims maintained herein, with prejudice, against defendants, City of Coffeyville, Kansas and Coffeyville Police Officers Richard Roe.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT all claims relating to or arising out of the transactions and occurrences alleged in plaintiff's Petition are hereby DISMISSED

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WITH PREJUDICE to the refiling of same, with each party to bear their own costs.

District Court Judge

APPROVED BY:

NIX & RINN

By_____
Jeff Nix,
NIX & RINN
2121 S. Columbia, #710
Tulsa, Oklahoma 74114-3521
Attorney for Plaintiff

By_____
Pamela A. McLemore (#16691)
MORRISON & HECKER L.L.P.
600 Union Center
150 North Main Street
Wichita, Kansas 67202-1320
Attorney for Defendants, City of Coffeyville, Kansas and Coffeyville Police Officers Richard Roe

AKREQ022.WIC/akr
65326-0002

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

J.B. REDUS and LINDA WILLIS,

Plaintiffs,

vs.

FORD MOTOR COMPANY, a corporation in the state of Delaware,

Defendant.

Case No. 95-C-1106-BU

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this 20 day of May, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

30

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RILANDRA F. BATISE; UNKNOWN SPOUSE OF Rilandra Batise; CITY OF BROKEN ARROW, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Case No. 95-C-1192-BU

ORDER

This matter comes before the Court upon Plaintiff's Motion to Vacate Clerk's Entry of Default and to Vacate Judgment of Foreclosure and Notice of Bankruptcy filed on May 15, 1996. For good cause shown, the Court hereby **GRANTS** the motion and **VACATES** the Entry of Default by Court Clerk filed on April 22, 1996 and Judgment of Foreclosure filed on April 25, 1996. The Court also **ORDERS** the Court Clerk to administratively close this case pending the bankruptcy proceedings of Defendant, Rilandra F. Batise. Plaintiff shall notify the Court when the automatic stay has been lifted and the subject property has been abandoned. At that time, the Court shall reopen this matter for final resolution.

ENTERED this 20 day of May, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

15

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRENDA GORDON, Plaintiff,	)	
v.	)	Case No.: 94-C-893-K
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	)	

FILED
MAY 21 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 20 day of ~~April~~ May 1996, it appearing to the Court that this matter has been settled through binding arbitration, this case is hereby dismissed with prejudice to the refiling of a future action.

s/ TERRY C. KERN
United States District Judge

416\11\stip-2.dlb\PTB

ENTERED ON DOCKET
DATE MAY 22 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND WILSON;
TERESA A. WILSON;
COMMUNITY BUILDERS, INC.;
ROGERS COUNTY PHONE COMPANY;
COUNTY TREASURER, ROGERS COUNTY, OKLAHOMA; BOARD OF COUNTY COMMISSIONERS, ROGERS COUNTY, OKLAHOMA,

Defendants.

Case No. 95-C-193K

ORDER ALLOWING DEFICIENCY JUDGMENT

THE Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed April 18, 1996, in which the Magistrate Judge recommended that the Motion for Leave to Enter to Deficiency Judgment of Defendant, Community Builders, Inc. will be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and is affirmed.

IT IS THEREFORE ORDERED that the Motion for Leave to Enter Deficiency Judgment of Defendant, Community Builders, Inc. is granted. Community Builders, Inc. is hereby awarded a deficiency judgment against Raymond Wilson and Teresa A. Wilson for the sum of $10,424.05, plus interest at the rate of 17% per annum from June 9, 1995 until judgment on July 26, 1995, which totals $227.95, plus

interest thereafter at the legal rate until fully paid.

DATED this 20 day of May, 1996.

s/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

Prepared by:

E. Mark Barcus, OBA #13244
James R. Gotwals, OBA #3499
JAMES R. GOTWALS & ASSOCIATES, INC.
525 South Main, Suite 1130
Tulsa, Oklahoma 74103-4512
(918) 599-7088

**ATTORNEYS FOR DEFENDANT,
COMMUNITY BUILDERS, INC.**

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE MAY 2 2 1996

F I L E D

MAY 21 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RONNIE D. BLAGG; CARLA S. BLAGG; STATE OF OKLAHOMA, ex rel. STATE INSURANCE FUND; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 680K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20 day of May, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. STATE INSURANCE FUND, appears not having previously filed a Disclaimer; and the Defendants, RONNIE D. BLAGG and CARLA S. BLAGG, appear not, but make default.

The Court further finds that the Defendants, RONNIE D. BLAGG and CARLA S. BLAGG, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning January 1, 1996, and continuing through February 13, 1996, as more fully appears from the verified proof of publication duly filed

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, RONNIE D. BLAGG and CARLA S. BLAGG, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendants, RONNIE D. BLAGG and CARLA S. BLAGG. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on August 14, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. STATE INSURANCE FUND, filed its Disclaimer on August 22, 1995; and that the

Defendants, RONNIE D. BLAGG and CARLA S. BLAGG, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, RONNIE D. BLAGG and CARLA S. BLAGG, are husband and wife.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Five (5), HOODS ADDITION, an Addition to the City of Tulsa, State of Oklahoma, a Sub-division of Lot 7, T.D. EVANS SUB-DIVISION, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on April 29, 1988, the Defendants, RONNIE D. BLAGG and CARLA S. BLAGG, executed and delivered to MORTGAGE CLEARING CORPORATION, their mortgage note in the amount of $33,164.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, RONNIE D. BLAGG and CARLA S. BLAGG, husband and wife, executed and delivered to MORTGAGE CLEARING CORPORATION, a mortgage dated April 29, 1988, covering the above-described property. Said mortgage was recorded on May 3, 1988, in Book 5096, Page 2434, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 21, 1988, MORTGAGE CLEARING CORPORATION, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on December 27, 1988, in Book 5147, Page 1835, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 1, 1989, the Defendants, RONNIE D. BLAGG and CARLA S. BLAGG, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on January 1, 1990, January 1, 1991 and January 1, 1992.

The Court further finds that the Defendants, RONNIE D. BLAGG and CARLA S. BLAGG, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, RONNIE D. BLAGG and CARLA S. BLAGG, are indebted to the Plaintiff in the principal sum of $55,289.36, plus interest at the rate of 10 percent per annum from March 21, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $4.00 which became a lien on the property as of June 20, 1991, a lien in the amount of $25.00 which became a lien on the property as of June 26, 1992, a lien in the amount of $6.00 which became a lien on the property as of June 25, 1993 and a lien in the amount of $6.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, RONNIE D. BLAGG and CARLA S. BLAGG, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. STATE INSURANCE FUND, disclaims any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, RONNIE D. BLAGG and CARLA S. BLAGG, in the principal sum of $55,289.36, plus interest at the rate of 10 percent per annum from March 21, 1995 until judgment, plus interest thereafter at the current legal rate of 5.60 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $41.00, plus costs and interest, for personal property taxes for the years 1990 though 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, RONNIE D. BLAGG, CARLA S. BLAGG, STATE OF OKLAHOMA, ex rel.

STATE INSURANCE FUND and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, RONNIE D. BLAGG and CARLA S. BLAGG, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $41.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
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(918) 581-7463

DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KELTON J. GUDENOGE)
)
Plaintiff,)
)
vs.) No. 96-C-277-K
)
WINSTON CONNER, Ottawa County)
District Attorney's Office, et al.,)
)
Defendant.)

FILED
MAY 21 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

EOD 5/22/96

ORDER

On April 8, 1996, Plaintiff filed this civil rights action along with a motion for leave to proceed in forma pauperis.[1] The Court now reviews Plaintiff's allegations and concludes that this action should be dismissed as frivolous.

In his pro se complaint, Plaintiff sues Winston Conner, the District Attorney from Ottawa County, for malicious prosecution. He contends Defendant has coerced him to plead guilty to drug charges which he did not commit. Plaintiff seeks money damages and an order directing that all charges be dropped.[2]

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive

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[1] Along with this complaint Plaintiff submitted a second complaint against Dan Gilbert, a Miami Oklahoma Police Officer, and Winston Conner, for false arrest.

[2] Plaintiff has not named Tom Gilbert, his appointed public defender, as a Defendant in this action. Therefore, the Court will not address Plaintiff's claims of ineffective assistance of counsel.

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litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that this action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. Winston Conner is entitled to absolute immunity for his actions taken in his role as prosecutor. Imbler v. Pachtman, 424 U.S. 409, 427-28 (1976). In any event, Plaintiff cannot seek money damages for the alleged invalidity of his conviction in Ottawa County prior to a determination that the conviction and resulting confinement are invalid. The Supreme Court recently held in Heck v Humphrey, 114 S.Ct. 2364, 2372 (1994), that in order to recover damages in an action brought pursuant to 42 U.S.C. § 1983 for an allegedly unconstitutional conviction or imprisonment, or for "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," a prisoner must show that the conviction or sentence has been

"reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."

Because the validity of Plaintiff's conviction and sentence has yet to be undermined, the Court must evaluate Plaintiff's claims to determine whether they challenge the constitutionality of his conviction or sentence. The Court concludes that they do. The majority of Plaintiff's allegations amount to claims of ineffective assistance of counsel. If proved, these claims would call Plaintiff's conviction into question under cases such as Strickland v. Washington, 466 U.S. 668 (1984).

Although pro se pleadings are to be construed liberally, see Haines, 404 U.S. at 520-21, a review of the complaint reveals neither factual allegations nor legal theories that might arguably support a basis for relief. Neitzke, 490 U.S. at 325. As noted above a decision in Plaintiff's favor would necessarily imply that his conviction and resulting confinement are invalid. Therefore, Plaintiff's complaint must be dismissed at this time without prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis is **granted** and this action is hereby **dismissed without prejudice** pursuant to 28 U.S.C. § 1915(d). The Clerk shall set up as a **separate civil rights action** Plaintiff's complaint, alleging false arrest against Dan Gilbert,

a Miami Oklahoma police officer, and Winston Conner.

IT IS SO ORDERED this 21 day of May, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FRANCES E. WILSON,

Plaintiff,

v.

TULSA JUNIOR COLLEGE, and KENNETH HALL, in his capacity as supervisor for Tulsa Junior College,

Defendants.

No. 95-C-51-K

O R D E R

Before this Court is the Motion for Summary Judgment of Defendants Tulsa Junior College and Kenneth Hall. Plaintiff Frances Wilson asserts causes of action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., alleging that her employer discriminated against her based on her sex.

I. Facts. Plaintiff Frances Wilson was employed by Tulsa Junior College ("TJC") as a custodian at its Southeast Campus from November 9, 1992 until April 22, 1994. Although neither party clearly describes the facts surrounding the instant action, it appears from the pleadings that the following are the alleged facts. On the evening of February 15, 1994, Wilson's supervisor, Ken Hall, exposed his penis to Wilson and said that if she engaged in oral sex, it would be beneficial to her job. Wilson refused Hall's sexual advance, called 911, apparently reaching

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the Broken Arrow Police Department, and reported Hall's actions. Wilson also reported the incident to the TJC Campus Police. After consulation with the Tulsa Police Department, Wilson consented to wear a body microphone and returned to work the following evening. At work she engaged in a conversation with Hall during which Hall threatened Wilson with various adverse job consequences if she pursued a sexual harassment claim against him. Hall was arrested by the Tulsa Police Department just after midnight on February 17, 1994. Hall was thereafter transferred to a different TJC campus. Wilson resigned from her job at TJC effective April 22, 1994.

*II. **Summary Judgment Standard.*** Under Rule 56(c), the moving party has the initial responsibility to show that "there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If this requirement is met by the moving party, the burden shifts to the nonmoving party to make a showing sufficient to establish that there is a genuine issue of material fact regarding "the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. The nonmoving party may not rest upon "the mere allegations or denials of [her pleadings]...." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). She must go beyond the pleadings and establish, through admissible evidence,

that there is a genuine issue of material fact that must be resolved by the trier of fact. Celotex, 477 U.S. at 324. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 252.

III. Analysis of Legal Arguments. Sexual harassment under Title VII can be shown under one of two principal theories: *quid pro quo* discrimination or hostile work environment. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-66 (1986). Plaintiff asserts causes of action under both theories; defendants argue that plaintiff's claims do not survive summary judgment under the above-described standard.

A. Quid Pro Quo Discrimination. *Quid pro quo* discrimination occurs when submission to sexual conduct is made a condition of concrete employment benefits. Hicks. v. Gates Rubber Co., 833 F.2d 1406, 1413 (10th Cir. 1987). "The gravamen of a *quid pro quo* sexual harassment claim is that tangible job benefits are conditioned on an employee's submission to conduct of a sexual nature and that adverse job consequences result from the employee's refusal to submit to the conduct." Id. at 1414. "If the plaintiff can show that she suffered an economic injury from her supervisor's actions, the employer becomes strictly liable without any further showing of why the employer should be

responsible for the supervisor's conduct." Id. at 1127 (quoting Kotcher v. Rosa & Sullivan Appliance Ctr., 957 F.2d 59, 62 (2d Cir. 1992)). Citing a D.C. Circuit case, Defendants argue that for Wilson to prevail on her *quid pro quo* claim, Hall must have carried out one of his numerous threats against Wilson; "saber rattling," defendants contend, is not sufficient. See Gary v. Long, 59 F.3d 1391 (D.C. Cir.), cert. denied sub nom Gary v. Washington Metropolitan Area Transit Authority, 116 S. Ct. 569 (1995).

Tenth Circuit authority supports defendants' argument. Mere threats are not enough to constitute *quid pro quo* sexual discrimination. Adverse job consequences must result from the employee's refusal to submit to the sexual conduct. See Hicks, 833 F.2d at 1414. Wilson does not claim Hall withheld concrete employment benefits or that any adverse job consequences *resulted from* her refusal to consent to his advances. That she resigned after Hall was transferred to another campus is not the type of economic harm contemplated under this theory of sexual harassment. Therefore, defendants are entitled to summary judgment in their favor as to Wilson's *quid pro quo* claim.

B. Hostile Environment Sexual Harassment. In Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986), the Supreme Court stated that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the

victim's] employment and create an abusive working environment." Id. at 67 (citation omitted). Defendants do not argue in their brief that the alleged actions of Hall did not rise to this standard. Rather, defendants argue that Wilson has not established TJC's liability for Hall's alleged actions.

The Tenth Circuit has set forth several potential bases of employer liability for acts of sexual harassment perpetrated by supervisors. One occurs when the employer negligently fails to respond to an employee's complaint of a hostile work environment. The employer may be deemed negligent if it fails to take appropriate action to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known. Hirase-Doi v. U.S. West Communications, 61 F.3d 777 (10th Cir. 1995) (quoting Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572, 577 (10th Cir.1990)). But see Meritor Sav. Bank, 477 U.S. 57 (1986) (rejecting petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability).

TJC contends that it is not liable as a matter of law because it "promptly suspended Hall and, when the results of the investigation were inconclusive, transferred him to another campus." (Def. Br. Supp. Mot. Summ J. at 8.) Based on the

record before it, this Court cannot hold, as a matter of law, that TJC's actions in response to plaintiff's complaints were appropriate. According to Wilson's deposition testimony, Hall had a history of harassing behavior toward her. Further, the adequacy of TJC's actions--including its initial response to plaintiff's report and its investigation, suspension and reassignment of Hall--raise factual determinations for a jury.

IV. Conclusion. For the reasons stated above, Defendants' motion for summary judgment is GRANTED as to Plaintiff's quid pro quo claim, and DENIED as to Plaintiff's hostile work environment claim.

ORDERED THIS 21 DAY OF MAY, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

INTER-CHEM COAL COMPANY, a wholly-owned subsidiary of INTERNATIONAL CHEMICAL COMPANY, INC., an Oklahoma corporation,

Plaintiff,

v.

ALTERNATIVE FUELS, INC., a South Carolina corporation, KRISMON KOAL, LTD., a Kentucky corporation, and SUPREME FUELS CORPORATION, a Florida corporation,

Defendants.

ENTERED ON DOCKET
DATE MAY 22 1996

CASE NO. 95-C-183-K

FILED
MAY 21 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

AGREED ORDER

Comes this day, Inter-Chem Coal Company by counsel David Mills, and Supreme Fuels Corporation by counsel Charles B. Dollison, and they represent to this Court that all matters between them have been settled and resolved and accordingly they request that Supreme Fuels be dismissed from this action and that Supreme Fuels' counterclaim against Inter-Chem be dismissed.

Accordingly, this Court does hereby ORDER, ADJUDGE AND DECREE that the plaintiff's complaint is dismissed with prejudice INSOFAR AND ONLY INSOFAR as it concerns Supreme Fuels Corporation and the counterclaim of Supreme Fuels Corporation again Inter-Chem Coal Company is also dismissed with prejudice.

The Clerk is hereby directed to send ~~certified~~ copies of this order to counsel of record.

Entered this 21 day of ~~March~~ May, 1996.

Judge

Prepared by:

Charles B. Dollison
BOWLES RICE MCDAVID GRAFF & LOVE
P. O. Box 1386
Charleston, WV 25325-1386
Counsel for Supreme Fuels Corporation

Agreed to by:

David W. Mills, Esq.
610 South Main Street - Suite 212
Tulsa, OK 74119
Counsel for Inter-Chem Coal Company
CHS-31289

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROLLIE A. PETERSON,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**CASE NO. 93-CV-399-H**
	)	
NANCY WALENTINY, JEAN A. HOWARD,	)	
	)	
	)	
Defendants.	)	

ORDER DISMISSING WITH PREJUDICE

Upon the stipulation of the parties, signed by all parties remaining in this action, pursuant to Rule 41 of the Rules of Civil Procedure, this matter is dismissed with prejudice to the refiling of the same. Each party to bear their own attorney fees and costs.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

In Re:	)	
TALLGRASS PETROLEUM CORP.,	)	
Debtor,	)	Case No. 95-C-853-B
AREL ENTERPRISES/ LEON NECHAMKIN,	)	
Appellant,	)	
vs.	)	
TALLGRASS PETROLEUM CORPORATION,	)	
Appellee.	)	

ORDER

By Order dated August 29, 1995, the Bankruptcy Court sustained the objection of the Debtor, Tallgrass Petroleum Corporation ("Tallgrass") to the claim of Leon Nechamkin/Arel Enterprises ("Nechamkin") in the sum of $290,000.00. Nechamkin appeals the decision of the Bankruptcy Court asserting that the Court improperly disallowed the claim. For the reasons discussed below, the Bankruptcy Court's decision is **AFFIRMED**.

I. STATEMENT OF FACTS & PROCEDURAL HISTORY

Tallgrass filed a voluntary chapter 11 proceeding on May 24, 1991. At the March 22, 1994 hearing, the Bankruptcy Court took judicial notice of several

additional bankruptcy proceedings, including: Joseph T. Sevitski, Jr., d/b/a Sevitski and Associates, Case No. 92-594; Welcome Oil Company, Case No. 92-717; Midland Fuel Corporation, Case No. 92-718; JPHL Investments, Inc., Case No. 92-719; Sevitski Pipe and Equipment, Case No. 92-720; and Henryetta Oil Supply Company, Case No. 92-721. [Hearing, March 22, 1994, Transcript filed October 3, 1995, at 6].

On March 13, 1993, Nechamkin filed a proof of claim. Tallgrass filed an objection to the proof of claim on October 15, 1993. Following a trial of the issues, the Bankruptcy Court, on August 17, 1995 sustained Tallgrass' objection to the claim.

Nechamkin contends that he began making investments with Joseph Sevitski in 1989 or 1990. According to Nechamkin, Sevitski told Nechamkin that Sevitski was the President of Tallgrass. Nechamkin, based on the representations made to him by Sevitski, entered into a Letter Agreement with Sevitski/Tallgrass.[1/] The draft of the "Tallgrass Petroleum Letter Agreement" (hereafter "Draft Agreement") notes that Tallgrass is engaged in the development, for the sale of oil and gas, of 1,500 acres in Tulsa. The Draft Agreement provides that Nechamkin "agrees to loan $300,000.00 and shall receive 50% net leasehold revenue as interest from the gross revenue from the sale of any and all gas and oil produced by the project." The Draft Agreement

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[1/] As explained in greater detail below, Tallgrass and Nechamkin dispute the actual parties to the agreement. Nechamkin asserts that the Letter Agreement binds Tallgrass, while Tallgrass denies that it is bound by the Letter Agreement.

provided a signature line for "Joseph Sevitski, President," and a signature line for "Leon Nechamkin."

According to Nechamkin, because he "was concerned that the rate of return on his investment might be illegally high," he requested that the Draft Agreement be changed to substitute Arel Enterprises, Inc. for Leon Nechamkin. The final agreement, which was signed September 18, 1990, contained signature lines for "Joseph Sevitski," and "Arel Enterprises, Inc." It additionally contained the following provisions:

> Subscriber agrees to loan $290,000 and shall receive 50% joint ownership revenue as interest from the gross revenue from the sale of any and all gas and oil produced by the project.
>
> It is understood by each of the parties that the subscriber's financial liability shall be limited to the above stated cash contribution.
>
> Tallgrass Petroleum does guarantee the value of this interest and guarantees that the interest will produce income for the subscriber.
>
> For each 50% joint owner in the Bower property in Tulsa Counties, Oklahoma Tallgrass Petroleum will pay Arel Enterprises, Inc. a [sic] annual rate of $360,000 [at $30,000 per month first payment to be made on December 20, 1990].
>
> In the event the systems are sold, the above mentioned subscriber shall have the option to convert [companies] contracted to a leasehold interest of 50% and to continue to receive royalties; or, to sell his/her contract, never to receive less than his/her original loan of $290,000. [additional share of profits above this amount will be paid to Arel Enterprises . . . every quarter (90 days).]

[Letter Agreement dated September 18, 1990 (bracketed portions indicate handwritten interlineation), emphasis added.]

Nechamkin asserts that Arel Enterprises/Nechamkin has a contract (the Letter Agreement) with Tallgrass Petroleum and is entitled to assert a claim in the bankruptcy proceeding for breach of that contract. According to Nechamkin, although Sevitski signed the agreement, Sevitski is the President of Tallgrass, the Letter Agreement references Tallgrass, and Tallgrass is therefor bound by the Letter Agreement. Nechamkin additionally contends that the Bankruptcy Code defines "claim" very broadly, that Tallgrass is obligated to pay Nechamkin, and that the Bankruptcy Court erred by disallowing Nechamkin's claim.

Tallgrass notes that the checks from Nechamkin were made payable to "Joseph Sevitski" and were deposited in the account of "Sevitski & Associates, Inc." Tallgrass contends that none of the money "invested" by Nechamkin was ever paid or transferred to Tallgrass and that Tallgrass was not involved in a "Bower Project," which is referenced in the Letter Agreement (contract). On appeal, Tallgrass asserts that no contract existed between Nechamkin and Tallgrass because Tallgrass never received consideration for the contract. (All of the money was paid directly to Sevitski or "Sevitski & Associates," not Tallgrass.) Tallgrass additionally asserts that it was not a party to the contract because: Nechamkin's "investment history" was with Sevitski; Nechamkin did not pay Tallgrass; the contract was executed by Sevitski in his personal capacity; no money was delivered to Tallgrass; and Tallgrass never owned an interest in the "Bower Project."

By Order dated August 29, 1995, the Bankruptcy Court sustained the objection by Tallgrass and disallowed Nechamkin's claim. The Bankruptcy Court's Order incorporated its findings and conclusions at the August 17, 1995 hearing. At the August 17, 1995 The Bankruptcy Court found that:

> The evidence to the Court is clear that Nechamkin, in fact, was an investor. And, that the sums of money forwarded to particular parties was in the form of an investment and not a loan. I note with interest, of course, as pointed out by the Trustee in the evidence, that there was no contract between the claimant in this matter and the debtor, Tallgrass. Substantial evidence has been presented before the Court as to the difficulty involved in the various and sundry activities of Mr. Sevitsky [sic]. And in this Court's opinion, under all of the evidence, that, at most, Nechamkin's claim may or might be considered as a type of claim asserting a proof of interest, to wit, the possibility of an equity security holder.
>
> In addition, certainly it is foggy and not clear where the claimant invested, and why, or what his security interest is in. And accordingly, under the evidence the Court is convinced that this was an investment, not a loan. And, that shall constitute the findings of fact and conclusions of law and decision in that matter.

[Transcript dated August 17, 1995, filed October 3, 1995, at 3.] The Bankruptcy Court further clarified its ruling in response to questions from Nechamkin's attorney.

> Nechamkin's attorney: Your Honor, with respect to the ruling, would it encompass a disallowance of a claim of interest by Mr. Nechamkin or Arel Enterprises? He didn't file it as a claim of interest.
>
> Bankruptcy Court: No.
>
> Nechamkin's attorney: And as I recall, there's [sic] no bar date. And, one thing that we'd [sic] anticipate doing is filing a claim of interest. And, I didn't know whether the Court was ruling on that aspect of it or not.

> Bankruptcy Court: Well, what I have held it that it's [sic] not an indebtedness, it's [sic] not a loan.

[Transcript dated August 17, 1995, filed October 3, 1995, at 4-5.]

II. STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. Conclusions of law are reviewed *de novo*. Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988). "Whether a Chapter 13 plan has been proposed in good faith is a question of fact subject to the clearly erroneous standard of review." Robinson v. Tenantry, 987 F.2d 665, 668 (10th Cir. 1993). "When reviewing factual findings, an appellate court is not to weigh the evidence or reverse the finding because it would have decided the case differently. A trial court's findings may not be reversed if its perception of the evidence is logical or reasonable in light of the record." In re Branding Iron Motel, Inc., 798 F.2d 396 (10th Cir. 1986) (citations omitted).

III. ANALYSIS

A. Proof of Claim vs. Proof of Interest

The Bankruptcy Code provides:

> A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

11 U.S.C. § 501. The Bankruptcy Court held, based on the facts and evidence presented by the parties, that Nechamkin did not have a "claim." The Bankruptcy Court noted that Nechamkin could qualify as an equity security holder, and that

Nechamkin was not foreclosed from filing a "proof of interest." [Transcript of Hearing on August 17, 1995, filed October 3, 1995 at 3-5.]

Appellant challenges this finding by the Bankruptcy Court asserting that "claim" is defined broadly under the Bankruptcy Code. Appellant argues that "Appellant might seek an equitable or legal remedy for Tallgrass's breaches of the Agreement. The Agreement gives no indication whatsoever that Appellant was agreeing to buy an ownership interest in Tallgrass. Regardless of whether the transaction is characterized as a loan, an investment, or a purchase, Tallgrass owes Appellant some money." [Appellant's Brief, filed February 2, 1996 at 10.]

Appellant's argument fails to recognize the distinction between an "interest" and a "claim." An "equity security holder" is permitted to file a "proof of interest." 11 U.S.C. § 501. An "equity security holder" is the holder of an equity security (see 11 U.S.C. § 101(17)), which is defined as "(a) share in a corporation, whether or not transferable or denominated "stock", or similar security; (b) interest of a limited partner in a limited partnership; or (c) warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share, security, or interest of a kind specified in subparagraph (a) or (b) of this paragraph." 11 U.S.C. § 101(16).

The Bankruptcy Court found that the Letter Agreement was "in the form of an investment and not a loan," and that Nechamkin might qualify as an equity security holder. [Transcript of Hearing on August 17, 1995, filed October 3, 1995 at 3.] Consequently, Nechamkin has the right, pursuant to 11 U.S.C. § 501 to assert a "proof of interest" rather than a proof of claim.

The Court's findings are supported by the record. The Letter Agreement provides, in part, that "Subscriber agrees to loan $290,000 and shall receive 50% joint ownership revenue as interest." [Letter Agreement dated September 18, 1990, emphasis added.] Tracy P. Little, a vice-president of Tallgrass, testified that he was aware that Nechamkin became an investor in September of 1990. [Partial Transcript of Proceedings on March 22, 1994, filed October 3, 1995, at 20.] In addition, Nechamkin, in his deposition, discusses the transaction as an "investment." [Telephonic Deposition of Leon Nechamkin, March 18, 1994, at 15-19.]

Appellant does not specifically challenge the findings of the Bankruptcy Court, but asserts that regardless of the "characterization [of the transaction] as a loan, an investment, or a purchase, Tallgrass owes Appellant some money." The Bankruptcy Court, however, did not foreclose Nechamkin from pursuing his interest. The Court held that Nechamkin did not have a claim but could still file a "proof of interest." The Bankruptcy Court's findings are supported by the record.

B. The Contract or Letter Agreement

Nechamkin additionally asserts that Nechamkin had a contract with Tallgrass. Nechamkin argues that the Letter Agreement identifies Tallgrass and Arel Enterprises (Nechamkin), and that the Letter Agreement was signed by Sevitski, as Tallgrass's President.

Tallgrass argues that no contract exists between Tallgrass and Nechamkin. Tallgrass points out that no evidence establishes that Sevitski "was the alter ego of Tallgrass," that no money was ever paid to Tallgrass (all money was received by

Sevitski), that Nechamkin's checks were made payable to Sevitski or Sevitski & Associates, that Tallgrass never participated in a "Bower project," and that Sevitski defrauded Nechamkin.

Both parties operate under the assumption that the Bankruptcy Court held that no contract existed between Sevitski and Tallgrass. The Bankruptcy Court's order merely sustains the objection by Tallgrass to Nechamkin's proof of claim, and "incorporates by reference" the findings and conclusions from the August 17, 1995 hearing. At the hearing, the Bankruptcy Court detailed its finding that the money provided by Nechamkin to Tallgrass resembled an investment more than a loan. [Partial Transcript of August 17, 1995 Proceedings, filed October 3, 1995 at 3]. The "holding" by the Bankruptcy Court was that Nechamkin did not have a proof of claim. However, the Bankruptcy Court also observed: "I note with interest, of course, as pointed out by the Trustee in the evidence, that there was no contract between the claimant in this matter and the debtor, Tallgrass." [Partial Transcript of August 17, 1995 Proceedings, filed October 3, 1995 at 3]. This statement is the Bankruptcy Court's sole pronouncement with respect to the status of the contract between the parties, and the statement was not necessary to the Bankruptcy Court's holding sustaining the objection to the proof of claim. Nevertheless, the record does not contain sufficient information to support a conclusion that a contract existed between Tallgrass and Nechamkin/Arel.

Nechamkin argues that Sevitski was the President of Tallgrass when Sevitski negotiated and signed the Letter Agreement with Nechamkin. Nechamkin did state,

in his deposition, that Sevitski told him that Sevitski was the President of Tallgrass.[2/] However, nothing in the record establishes that Sevitski was Tallgrass' President. The record contains no testimony from a principal of Tallgrass that Sevitski was acting on behalf of Tallgrass when he negotiated with Nechamkin. The record contains nothing from Tallgrass (or Sevitski) indicating Sevitski's relationship with Tallgrass. The record contains no articles of incorporation listing the directors or officers of Tallgrass. Absent some indication in the record that Sevitski was either acting on behalf of Tallgrass at Tallgrass' request (*i.e.* actual or apparent authority), or that Sevitski was an officer, director, or agent acting on Tallgrass' behalf,[3/] the record cannot support a finding that Tallgrass was bound by the Letter Agreement executed by Sevitski and Nechamkin/Arel. See, e.g., Curtis-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1229 (1995) ("A corporation is bound by contracts entered into by its officers and agents acting on behalf of the corporation and for its benefit, provided they act within the scope of their express or implied powers.") citing Fletcher on Corporations; Nucor Corp. v. Aceros Y Maquilas De Occidente, S.A. De C.V., 28 F.3d 572 (7th Cir. 1994) (discussing requirements of actual and apparent authority).

[2/] Appellant additionally refers the Court to a document prepared by "Capital Alliance Corporation" (Kirtley Exhibit 1). The document was presented by Mr. Sevitski to Mr. Kirtley, and lists Sevitski as a "Director" of Tallgrass. The record does not indicate that this document was presented to Mr. Nechamkin; the record does not indicate that the document was prepared by Tallgrass; and the record does not indicate that Tallgrass was aware of the existence of the document.

[3/] Appellant's only citations to the record are to statements by Nechamkin (or other "investors") that Nechamkin (or the other investors) thought Nechamkin was an officer, director, or agent for Tallgrass. However, Appellant's belief as to Sevitski's status with respect to Tallgrass does not establish that Tallgrass was bound by Sevitski's actions.

Accordingly, the decision of the Bankruptcy Court is **AFFIRMED**.

Dated this 21 day of May 1996.

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE ACTAVA GROUP, INC., a foreign corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 95-C-668B
RASOR-WEST DISTRIBUTING, CO., INC., a foreign corporation; THE MADDOX COMPANY, a foreign corporation, and RASOR-WEST, INC., a Texas corporation,	)	
Defendants.	)	

AGREED JUDGMENT

On May 20, 1996, this matter came on for jury trial. The parties have announced to the Court that they have agreed to entry of judgment. After reviewing the pleadings and the other papers on file herein, and after being advised of the agreement of the parties, the Court enters judgment as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

Plaintiff and its successors and assigns do hereby recover judgement of and from Defendant Rasor-West, Inc. the sum of $360,045.00, Defendant Rasor-West Distributing Co., Inc. the sum of $1,123,178.00 and of and from Defendant The Maddox Company the sum of $963,524.00.

Interest on the above sums shall accrue from January 1, 1996, at the prime rate of interest as determined from time to time by the prime rate published in the Wall Street Journal on the 25th day of each month, or the next succeeding publication date if not published on the 25th day of the month, the prime rate shall be

reestablished each 25th day of the month and shall be part of this judgment.

Plaintiff is further granted judgment for its attorney's fees and collection costs against Defendants in the amount of $15,455.04.

Execution on this judgment, with the exception of discovery in aid of execution, may not be had until August 20, 1996, after which date execution may issue.

IT IS SO ORDERED.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND FOR ENTRY:

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

PREVIN D. JACKSON,
Plaintiff.

V.

CITY & COUNTY OF TULSA,
Et. Al. Defendant.

CASE NO. 96 C 0185H

VOLUNTARY DISMISSAL WITHOUT PREJUDICE

Comes now, the Plaintiff, PREVIN D. JACKSON, and pursuant to FED R CIV P RULE (41) (a), moves for a VOLUNTARY DISMISSAL of the present action against all of the Defendants so named in Plaintiff's Original and Amended Complaints. The basis for Plaintiff's Voluntary Dismissal is the fact that he has not presented the Court with enough evidence to substantiate his claims. No Responsive Pleading has been filed by the Defendants, and the Defendants will not be Predicedor or Prejudiced by this Dismissal.

RESPECTFULLY SUBMITTED:

Mr. Previn D. Jackson

PREVIN D. JACKSON, Pro Se.

> evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

As an alternative to filing a Rule 5 answer, Respondent may file a motion to dismiss based upon alleged nonexhaustion, abuse of the writ pursuant to Rule 9 of the Rules Governing § 2254 Habeas Corpus Cases, or lack of jurisdiction. If Respondent files a motion to dismiss based upon alleged nonexhaustion, and if Petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of Petitioner's brief on appeal and of the opinion of the appellate court, if any, should be filed by Respondent with the motion to dismiss.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Petitioner's motion for leave to proceed in forma pauperis (docket #2) is **granted**.

(2) The Clerk shall **mail** a copy of the petition to the Oklahoma Attorney General and to Petitioner. See Local Rule 9.3(B).

(3) Respondent shall **show cause** why the writ should not issue and **file** a response to the petition for a writ of habeas corpus within thirty (30) days from the date of entry of this order. Extensions of time will be granted for good cause only and in no event for longer than an additional twenty (20) days. Fed. R. Civ. P. 81(a)(2).

(4) Petitioner may file a **reply brief** within fifteen (15)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRETT FOUT,

Petitioner,

vs.

RON WARD,

Respondent.

No. 96-CV-356-E

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS AND REQUIRING RESPONDENT TO SHOW CAUSE

Petitioner has filed with the Court a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In reliance upon the representations set forth in the motion, the Court concludes that Petitioner should be granted leave to proceed in forma pauperis.

Respondent is directed to prepare his response pursuant to Rule 5 of the Rules Governing section 2254 Habeas Corpus Cases. That rule states:

> The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts . . . are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcript as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the

days after the filing of Respondent's response.

(5) The Attorney General and Tulsa County are **dismissed** as parties in this case.

SO ORDERED THIS 17th day of May, 1996.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HOMEWARD BOUND, INC., et al.,

Plaintiffs,

vs.

THE HISSOM MEMORIAL CENTER, et al.,

Defendants.

Case No: 85-C-437-E

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on April 3, 1996 for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees, DHS, DRS, and OHCA's objections, and approves the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees in the amount of $42,785.00 and out-of-pocket expenses in the amount of $5,315.00.

IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to Plaintiffs' counsel, Bullock & Bullock, for attorney fees in the amount of $42,785.00 plus expenses in the amount of $5,315.00 and a judgment in the amount of $48,100.00 is hereby entered on this day. The Court hearing on the contested fees and expenses in the amount of $9,246.25 (Attachment A) will be held on 13 day of June, 1996 at 10:30 ~~A~~m.

ORDERED THIS 17 DAY OF May, 1996.

S/ JAMES O. ELLISON

JAMES O. ELLISON
UNITED STATES DISTRICT COURT

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ATTORNEYS FOR DEFENDANTS

ATTACHMENT A

Defendants jointly object to the following attorney fees and expenses:

ATTORNEY FEES:

LWB		PWB	
03/08/96	3.00		
03/08/96	1.00	03/08/96	4.75
03/11/96	.50	03/13/96	7.00
03/12/96	5.50	03/14/96	4.00
03/13/96	7.25	03/15/96	.75
03/14/96	4.50	03/18/96	3.75
03/15/96	1.75	03/19/96	4.50
03/18/96	3.00		
03/19/96	3.00		
TOTAL	29.50 X $175 = $5,162.50	Total	24.75 X $145 = $3,588.75

TOTAL ATTORNEY FEES JOINTLY CONTESTED: $8,751.25

EXPENSES:

NH		SLW	
03/13/96	.75	03/13/96	1.00
03/14/96	1.75	03/18/96	.25
03/15/96	.50	03/20/96	.50
03/18/96	.75	03/27/96	.25
03/19/96	1.50		
03/20/96	.50		
03/21/96	.50		
Total	6.25 X $40 = $250.00	Total	2.00 X $40 = $80.00

Travel

03/11/96	$15.00[1]

TOTAL EXPENSES JOINTLY CONTESTED: $ 345.00

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[1]Plaintiffs' stipulate this $20.00 mileage charge should have been $5.00.

ADDITIONAL TIME AND EXPENSES DHS AND DRS CONTESTED:

ATTORNEY FEES:

PWB

O2/14/96 .50 X $145 = $72.50

EXPENSES:

03/18/96 Fax 10.00[2]
03/1/9/96 Fax 37.50

SLW

02/15/96 .75 X $40 = $30.00

TOTAL OF COMBINED TIME AND EXPENSE OBJECTIONS:

Attorney Fees:

Louis Bullock	$5,162.50
Patricia Bullock	$3,661.25
Total	$8,823.75

Expenses:

Nadine Hodge	$ 250.00
Sharon Wilson	110.00
Faxes	47.50
Mileage	15.00
Total	$ 422.50

TOTAL OF CONTESTED FEES AND EXPENSES: $ 9,246.25

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[2]This fax was objected to by DHS and DRS and is identified by the date incurred and the nature of the objection. The amount, however, was erroneously omitted from the conclusion section of the objection.